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¶*This magazine is an open forum for the free expression of opinion concerning public utility regulation and allied topics. It is not the mouthpiece of any group or faction; it is not under the editorial supervision of, nor does it bear the endorsement of, any organization or association. The editors do not assume responsibility for the opinions expressed by its contributors.*

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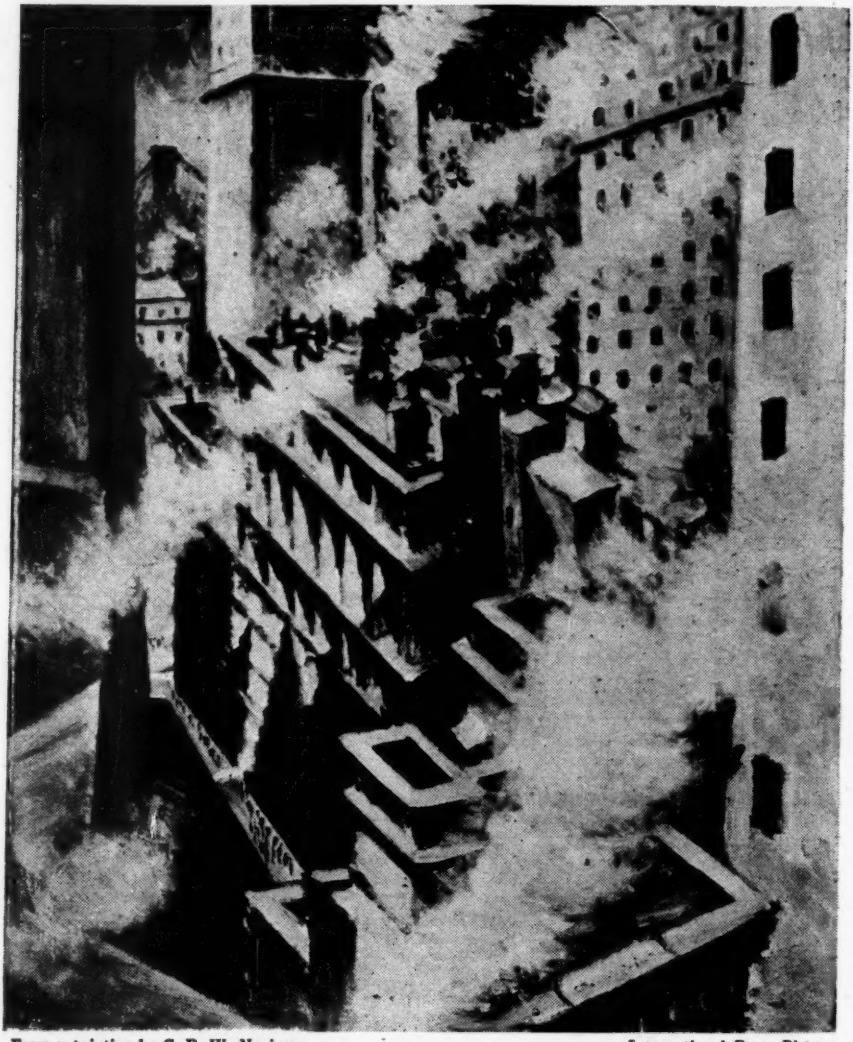
Public Utilities Almanack

AUGUST

3	T^h	An exhibition of gas, described as "inflammable air," stirred Richmond, Va., 1803. Famous locomotive *"General McPherson"* was put into service by Union Pacific, 1865.
4	F	DR. CLAYTON succeeded in storing natural gas in Lancashire, England, 1660. The first International Radiotelegraph Conference was held in Berlin, 1903.
5	S^a	The first desk type of telephone instrument was put into service, 1886. The first transatlantic cablegram was sent from New Foundland to Europe, 1858.
6	S	VON SOMMERING transmitted messages successfully with electric telegraph, 1809. First commercial use of radio was made in Alaska by U. S. Signal Corps, 1904.
7	M	Indians wrecked a Union Pacific train and scalped the crew, 1867. Radio broadcasting was first used as a paid advertising medium, 1923.
8	T^u	*"Stourbridge Lion,"* first successful steam locomotive in U. S., was tested, 1839. Baggage cars were first introduced on American railroads, 1834.
9	W	FULTON'S steamboat gave an exhibition run of 4 miles on the Seine, France, 1803. The Public Utilities Commission of Ohio was created, 1913.
10	T^h	First passenger trip from Albany to Schenectady on Mohawk & Hudson Railroad, 1831. S. D. CUSHMAN'S "talking box" first transmitted voice over a wire, 1851.
11	F	The last splice was completed in the New York-Chicago telephone cable, 1925. FULTON'S steamboat *"Clermont"* made first successful trip, N. Y. to Albany, 1807.
12	S^a	GEORGE STEVENSON, inventor of the steam locomotive, died, 1848. The Public Utilities Commission of Colorado was created, 1914.
13	S	The *"Cristobal"* steamship was the first vessel to pass through Panama Canal, 1914. HAWKS made record airplane flight, N. Y. to Los Angeles, in 12 hrs., 25 min., 1932.
14	M	MATTHIAS W. BALDWIN obtained a patent on his locomotive, 1842. Postal rates between Atlantic and Pacific were lowered to 40 cents a letter, 1848.
15	T^u	The Panama Canal was formally opened for public traffic, 1914. The first telephone exchange in Michigan was opened in Detroit, 1878.
16	W	DAVID MELVILLE lighted his house in Pawtucket, R. I. with gas, 1812. The first steel rails for railroads were laid in the United States, 1864.



From a painting by C. R. W. Nevinson *International Press Pictures*

Wall Street

Public Utilities
FORTNIGHTLY

VOL. XII; No. 3 AUGUST 3, 1933

The New Federal Securities Act

How it affects the financial policies of the utilities and the authority of the state commissions

BY WILLIAM M. WHERRY

BY the new Securities Act the Federal government enters a field heretofore left exclusively to the states.

This is bound to have widespread effect on every industry. The act is of special interest to public utilities. They cannot maintain their service without continuous capital investment, which makes it imperative that they should be able to market their securities freely and widely. In most states having Blue Sky laws their securities are exempt if a public utility commission has authorized their issuance.

This preferred position is now lost to the industry.

ALTHOUGH novel in our jurisprudence, the new law has a respectable ancestry and is not entirely novel in its general conception or in many of its provisions. As has been pointed out, the general theory of such preventive devices as Blue Sky laws of this type dates back to the committee headed by William Ewart Gladstone in the last century. Some of the principles were clearly expounded forty years ago by Louis D. Brandeis, now Justice of the United States Supreme Court. Nevertheless, one looks in vain for a clear, succinct analysis of the problem and a discussion of the limitations which must surround all such preventive devices in order to make them effective. This act was drawn by Mr. Huston Thompson, formerly of the Federal Trade Commission, although the actual drafts-

man is said to be a Liberal authority on the Constitution, Professor Felix Frankfurter. At least one section (§ 15), which will probably give rise to much litigation, was obviously contributed by Professor A. A. Berle.

ALTHOUGH the Securities Act is carefully drawn, it has a certain ponderosity of style, and, as has been playfully pointed out by the newspaper humorist F.P.A., "is not free from ambiguities." The litigation which will undoubtedly arise under it will not be due so much to defects in draftsmanship as to substantial matters of principle. Constitutional limitations will be again asserted and considered. The bulk of litigation will concern abuse of power by the bureau entrusted with the enforcement of the act, and its underlings, and the countless questions involving construction of its language and the application thereof to situations not contemplated or anticipated by the draftsmen and which always occur when attempts are made to include in a bill "everything the sponsors of it could think of," and to substitute "faith in documents for faith in character."

At the very outset it should be observed that public utilities are not directly discriminated against by this bill. They are not given any preferential position under the bill. Their securities are not included in the definition of "exempt securities." In this respect, they differ from the carriers subject to the provision of § 20-a of the Interstate Commerce Act. (Securities Act, § 3, sub-section (a)-6.)

At one point in the period of gestation it was proposed to exempt the securities of those public utilities which had been passed upon and authorized by public utility commissions, but the bill as enacted contains no such exemption.

As already pointed out, it is impossible for public utilities to maintain their service without continuous capital investment. As the industry has grown and extended beyond state lines, becoming more and more interstate in character, it has commanded a wider market, and, at the same time, has become less able to finance locally. If public utility securities had been made exempt, this necessity for a constant and continuous market would have been met. The effect of omitting securities of public utilities is to put them at a disadvantage in rendering their service, although there is no direct discrimination.

BEFORE going further with our discussion, let us briefly summarize what this statute provides.

The act purports to be an exercise of the power of Congress over interstate commerce; but it also incidentally rests on the power of Congress to regulate the mails and the use of post-roads. The significance of this will be more apparent when we come to discuss some of the constitutional questions. The act is essentially a Blue Sky law. It does not deal with the issuance of securities, but with their sale and transportation. As was stated in the course of the limited debate on the act, "if there is no sale there will be no violation of the act." Nevertheless, the act does attempt to reach back beyond the point at which interstate commerce commences and ends, and places a liability on the

issuer of securities as well as on those who distribute them.

Some of its definitions are quite novel. For instance:

An underwriter is defined as someone who has purchased a security from the issuer, with a view to distributing that security to the public. The act attempts to regulate the transactions of the issuer, the underwriter, the dealer, and all others in connection with the sale of the security, through the device of treating the security, and a prospectus concerning it as commodities of interstate commerce.

In brief, the act prohibits any person from directly or indirectly making: (1) "use of any means or instruments of transportation or communication in interstate commerce or of the mails to sell or offer to buy such security through the use or medium of any prospectus or otherwise, or (2) to carry or cause to be carried through the mails or in interstate commerce by any means or instruments of transportation any such security for the purpose of sale or for delivery after sale," unless there has been a certificate of registration as to the security filed with the Federal Trade Commission. Further, it prohibits, in a similar way, the use of the instruments of transportation or communication in interstate commerce or of the mails, to carry or transmit a prospectus, unless the prospectus meets certain prescribed requirements, and prohibits the use of the mails or interstate commerce for transporting a security for the purpose of sale or delivery after sale "unless accompanied or preceded by a prospectus that meets the requirements of § 10."

In other words, before one can sell a security or offer to sell it, by mail or any instrument of transportation or communication, he must file a registration statement under this act with the Federal Trade Commission.

WHAT is this registration certificate?

It is a blanket form, which, in general, requires "the furnishing of some ninety-nine separate and distinct major items, and probably an additional one hundred supplemental items of information."

In addition to furnishing the information required, rules and regulations of the Federal Trade Commission must be complied with.

The act also requires that the prospectus relating to any such security shall contain approximately the same information and data, although additional data may be prescribed by the Federal Trade Commission.

After the registration has been filed, twenty days must elapse. During this time objection can be made. The Federal Trade Commission may call for an amendment to the certificate as not complying with the act; may have hearings on it; may, under certain circumstances, issue stop orders; and may otherwise postpone the effec-

¶ "IN *most states having Blue Sky laws the securities are exempt if a public utility commission has authorized their issuance. This preferred position is now lost to the industry.*"

tive date at which the sale may take place. Nevertheless, it is to be hoped that in most cases twenty days after the filing of the registration the securities may be delivered.

The provisions of the act relating to these matters do not go into effect until sixty days after the approval of the act by the President, which took place on May 27, 1933, so that the first securities to be sold under this provision will be sixty days after that date.

The act also imposes penalties upon fraudulent interstate transactions, and this § (17), and those relating thereto, go into effect immediately. This section enlarges the common-law definition of fraud. It also seeks to prevent circulation of tipster sheets.

THERE are two sanctions provided for in the act. First, a penalty of $5,000 or five years' imprisonment for wilful violation of its provisions; and second, a civil liability for misstatements or omissions of material facts in a registration certificate or a prospectus. This is imposed, not merely on all those who sign the registration certificate, but on directors, accountants, engineers, appraisers, and others who were engaged in its preparation; and upon underwriters, and upon those who sell by means of a prospectus, and, finally—thanks to Professor Berle—"upon every person who by or through stock ownership, agency, or otherwise, or who pursuant to or in connection with an agreement or understanding with one or more other persons by or through stock ownership, agency, or otherwise, controls any person liable under §§ 11 and 12 of the act."

This last provision is obviously intended to prevent the use of dummy directors and to reach those whom they represent.

As to the extent of the liability, Professor Berle says:

> "In no case, however, can he recover more than the price at which the security was offered to the public; that is to say, the maximum damage is the price at which public offering took place."

Due care is a defense. But the burden of proof is shifted to the defendant.

A stipulation waiving compliance with any provision of the act, or rules and regulations of the Federal Trade Commission, is made void. If the validity of this provision is sustained by the courts, one cannot protect himself from the extreme liabilities prescribed in the act.

THE act provides for a judicial review of any order of the Federal Trade Commission. Any person aggrieved by such an order may appeal to the United States Circuit Court of Appeals, but on any such appeal the court is prevented by the act from reëxamination of any findings of fact made by the Trade Commission.

Such findings of fact are made conclusive on the court.

Furthermore, no new evidence can be introduced before the court unless the same is first submitted to the Trade Commission.

An additional method of enforcing the provisions of the Securities Act is provided in § 20. This section gives the Trade Commission power to procure an injunction to restrain any violation or threatened violation of the act or any regulation made pursuant thereto. Under this section the Trade

Will the Act Increase the Confidence of the Investor in Public Utility Securities?

"ANYTHING which tends to lessen the risk of the investor in the public utility industry and to strengthen his security lowers the cost of capital to the industry, which should, in turn, result in better service and lower rates. If this act can fairly be expected to increase the confidence of the investor in its securities, it would be a great boon to the public utility industry."

Commission also has power through mandamus to compel any person to comply with the provisions of the act.

There is provision for a limitation of from two to ten years upon suits brought to enforce civil liabilities. The two years begin to run from the discovery of an untrue statement or omission, or an actual sale where no registration certificate has been filed. There is an absolute limitation of ten years, dating from the time when the security was *bona fide* offered to the public.

OF course, the act does not purport to reach every transaction, or even sale of securities. In the first place, the law contemplates a general public offer announced by advertisement, circular, and general campaign. It also applies to "after market" transactions in a security which has been publicly offered within a year after the first public offer. It does not apply to a sale unless there is a public offering. It does not apply to strictly intrastate transactions. It does not apply to transactions by any person other than an issuer, underwriter, or dealer, as defined by the act, nor to brokers' transactions executed on customers' orders. (It does, however, apply to the solicitation of such orders under certain circumstances.) It does not apply to the issuance of securities to existing security holders or creditors in a reorganization, or to such things as receivership certificates.

There are some other exempted transactions. Many questions are bound to arise under § 4 and § 5-(c), which attempt to enumerate and define those transactions to which the statute does not apply.

This, then, is the essence of the statute:

It requires a registration of what

are supposed to be the essential facts relating to securities with a public board twenty days before the security can be sold to the public, and imposes a civil liability for damages on directors, officers, and others where the registration contains material misstatements or omissions of facts.

What makes this act unique is that it is the first Federal act of the kind; that it is an attempt to enlarge the power of the Federal government over industry through an extension of the commerce power and the power over mails; and, as a Blue Sky law, it requires wider and more onerous information and imposes heavier liabilities upon *more* persons connected with the sale and distribution of securities than heretofore has been considered wise or necessary.

LET us now turn to what should be the legitimate purposes of such a preventive device as a Blue Sky law. Such an act should, in general, have three purposes:

First, to protect the investor; second, to safeguard the seller; and, third, to increase the facilities of proper financing, and this last is of special importance to public utility enterprises.

IN connection with the protection of an investor, it is most important to educate the investor so that he will learn those things which should be taken into account to determine what is a sound investment and what is a mere gamble or speculation. A mere prohibition of the sale of fraudulent securities accomplishes very little. A registration blank which contains so many items that the investor cannot for the life of him determine what are significant and what are insignificant is likewise futile, from this point of view. A great service could be rendered to the investor if one could frame a registration blank which would impress upon any one examining it that the significant facts to be considered in testing the soundness of an investment are the security of principal, certainty of income, and marketability of the security offered. Such a registration might be a marked step forward in discouraging gambling.

This act does not come anywhere near furnishing such a *desideratum.*

It has been stated by one of its sponsors that its purpose is very conservative and that it merely requires that a purchaser shall be "fully informed as to the facts, leaving it up to him to decide whether he wants to invest." There is no question as to the fullness of the information required, but this very fullness may defeat its purpose. These registration blanks are more like the 6-foot ballots than any other instrument of torture invented by democracy, and they violate the same fundamental principle. Where too much is attempted to be covered, nothing gets proper consideration. If the voter is asked to elect too many candidates, he is overwhelmed. When the untried investor is handed a prospectus, like a Sears-Roebuck catalog, he will actually know less than ever what he is buying.

THE next important thing in the protection of the investor is to prevent the issuance of doubtful securities. This is not attempted by this act, except in so far as it puts a limita-

tion on the sale of such securities and imposes liabilities on those connected with such sale. There is no provision for predetermination of disputed facts. There is no government approval of the security and no assumption of responsibility by the government as to the "worthiness" of such securities.

THE next important thing is, of course, to prevent the sale of doubtful securities. That is not attempted here, except in so far as the penalties and civil liabilities provided for by the statute may act as a deterrent. As Representative Mott said:

> This act "does not undertake to proscribe the sale of any securities in the first instance, no matter how fraudulent they may be. All that is necessary is that the issuer file his statement, wait thirty days, and then go ahead and sell his stock."

THE final essential for the protection of the investor ought to be an adequate and proper remedy in case he is damaged. Usually an investor finds difficulty in obtaining proof of his cause of action, as well as in locating a responsible defendant. From the point of view of furnishing a remedy to the unfortunate investor, this act leaves little to be desired. In the first place, the registration blank, and the provisions in regard to prospectuses, cover such a large field that he ought to have little difficulty in obtaining requisite proof. In the second place, the common-law cause of action for losses due to misrepresentations or failure to make disclosures in sales, is enlarged by this statute. Under its terms it is no longer necessary to show that the investor examined the registration blank or relied upon any of the statements made in it. It is simply necessary to show that the misstatement or omission concerned a material fact. It is true, the courts may, by construction, hold that no act is material unless the plaintiff relies upon it. But the obvious purpose of the framers of the statute is to change the common-law rule.

Further, although due care is a defense to a cause of action, the burden of proof is shifted to the defendant, who must establish the fact that he did exercise reasonable care in putting out his security and acquiring the information and in the selection of his expert advisers.

NEXT, as to finding a responsible defendant:

The large number of people he may sue, ranging all the way from the directors to the mythical being sitting in control, and including accountants, appraisers, engineers, and perhaps lawyers, muster a host out of which it ought to be easy to select one or two individuals who would either be able to satisfy a judgment or pay a sum to avoid a damaging lawsuit.

There is nothing in the act to safeguard the vendor. There is nothing in the act to increase the facilities of financing. In fact, additional burdens

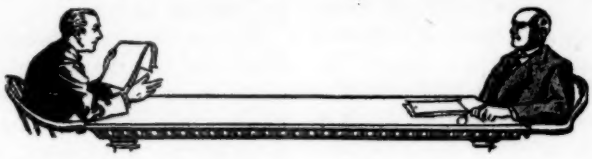
¶ "ANOTHER *serious question for public utility companies under this act is how far they will be allowed by the public utility commissions to include the cost of compliance with this act in their operating expenses.*"

are imposed upon financing, since, in order properly to protect themselves, the officers and directors of a corporation would have to spend large sums for expert services of accountants, engineers, appraisers, and lawyers. The cost of protecting the investor is transferred to the seller.

Examining the statute, then, from the point of view of the principles applicable to such preventive devices, we find that it leaves something to be desired. In fact, it seems more as if the object of the statute was to furnish a remedy to investors who had suffered unfortunate losses than to prevent gambling or the issuance of doubtful securities. This has a direct significance for the public utility industry. One fundamental principle which underlies that whole industry is that the lower the risk the less the cost of financing. Further, anything which tends to lessen the risk of the investor in the public utility industry and to strengthen his security, lowers the cost of capital to the industry, which should, in turn, result in better service and lower rates. If this act can fairly be expected to increase the confidence of the investor in its securities, it would be a great boon to the public utility industry. On the other hand, it is not unfair to assume that by giving the investor a remedy, regardless of his own diligence, it encourages him to gamble and places the stress upon his remedy for losses, and not on the need for soundness and security in what he buys.

THE principle which I have above stated has been generally recognized in the establishment of public utility commissions. There has been an effort to eliminate the uncertainties of competition, to stabilize rates by fixing them with reference to conditions which are going to obtain over a long period of time so that they will not fluctuate from day to day with temporary changes, and to give the investor secure, constant, and adequate return, rather than great opportunities for huge speculative profits. As a means of forwarding this principle, most of the public utility laws contain provisions by which the issuance of public utility investments is passed upon in advance by a commission. The company has an opportunity to establish the value of the property, the earning power of the enterprise, the lawfulness of the purpose, and the regularity of the proceedings, under these statutes, and this, in itself, tends to strengthen the confidence of the public in the securities issued. The new Federal Act does not add any greater safeguard to the purchaser of public service securities. It is not, therefore, of any great help to the industry, which must still rely on the state statutes.

The fact, however, that the Federal government has passed an act recognizing that the purchaser of securities is a part of the public and entitled to protection, ought to have significance for commissions when they come to consider what are fair earnings for utilities whose securities in the hands of the public have been issued under their approval. In rate cases the commissions should be courageous in resisting public clamor for lower rates and recognize the obligation which the state owes to protect investors in public security investments, as well as the



The New Act Regulates the Sale of Utility Securities Only in Interstate Commerce

"THERE is a distinction between the provisions of most of the Public Service Acts and the provisions of this new Federal Securities Act. The former regulates the issuance of securities; the latter merely regulates public sale thereof in interstate commerce. The provisions of the Public Service Laws, therefore, are, in most cases, not inconsistent with the new Federal Securities Act."

duty to see that service is maintained and rates are reasonable.

LET us now turn to the constitutional questions presented by this statute.

At the very outset we have a question of constitutional power. It has become a commonplace in our time for the government to divert and enlarge the commerce clause. Certainly the original constitutional theory was that the power over interstate commerce was conferred upon the Federal government to prevent the states from imposing unreasonable restraints thereon. The object was to give Congress power to extend, encourage, and permit free flow of commerce between all of the states. The only incidental powers which Congress has under this grant of power must be those which are necessary to accomplish the main object, that is, to increase the free flow of commerce. What we have in this statute is an attempt by Congress to regulate matters heretofore considered of purely local concern by limiting the right to engage in interstate commerce. The right to engage in interstate commerce is a privilege created by the Constitution, and, in general, does not require a license from Congress. Such a requirement would violate the spirit of the Fifth Amendment. The new Federal Securities Act does not require that one who sells securities in interstate commerce shall take out a license, but it does take a long first step in that direction.

There is a grave constitutional question as to whether Congress has power under the commerce clause to pass this act, and yet it is the commerce clause upon which the legislation chiefly rests.

THERE is a subsidiary constitutional question, and that is whether securities, which are mere choses in action, and prospectuses, which are mere advertisements, are commodities of commerce which can be regu-

lated by the Federal government.

Paul *v.* Virginia (1896) 8 Wall. 168, 19 L. ed. 357, holding a fire insurance policy was not a commodity of commerce, has been often cited as authority for the proposition that a mere chose in action is not an article of commerce. That case has been extended and modified and limited by many subsequent cases. The question of its applicability to the Federal Securities Act has been raised, and undoubtedly this statute does present the matter in a novel aspect.

A more important constitutional question is whether the regulations under the commerce clause can be made to reach back to the point of the preparation or production or manufacture of an article which is intended to be put in commerce; whether those acts which transpire before the article becomes a part of commerce can be controlled by Congress under the guise of regulating interstate commerce.

There is also the constitutional question as to whether the court review provided for is sufficient to constitute due process of law. Can the determination of a mere administrative body be a sufficient judicial finding of fact to serve as a basis of depriving a man of property and the right to engage in business? This statute is only one of many which seeks to shackle the judiciary.

If the constitutionality of this statute is sustained under the commerce clause as a valid exercise of Federal power, we then come to a graver question; namely, the effect of this statute upon the state statutes, such as Blue Sky laws and public utility laws containing provisions regulating issuance and sale of securities.

It is an elementary principle of constitutional law that when the Federal government enacts a regulatory statute in a field in which it has exclusive jurisdiction, inconsistent state laws become invalid. If the regulation of the issuance of securities, as contemplated by this bill, is a Federal function, then state laws regulating the sale of the same securities may be illegal as being a burden on interstate commerce. There is no question that the enactment of this law raises grave questions as to the validity of many existing state laws.

There is a distinction, as I have already pointed out, between the provisions of most of the Public Service Acts and the provisions of this new Federal Securities Act. The former regulates the issuance of securities; the latter merely regulates public sale thereof in interstate commerce. The provisions of the Public Service Laws, therefore, are, in most cases, not inconsistent with the new Federal Securities Act, nor in themselves of a character which would amount to a burden on interstate commerce.

The validity of state statutes is attempted to be safeguarded by § 18 of the new Securities Act, which provides that:

> "Nothing in this title shall affect the jurisdiction of the Securities Commission, or any agency or office, performing like functions of any state or territory of the United States or the District of Columbia over any security or any person."

This may solve the constitutional difficulty, but because of the lack of uniformity in the state laws is sure to raise many difficulties. Most of these difficulties can be eliminated

by amendments of the state laws.

LET us now turn to the particular effect of this act on public utility companies.

In the first place, it is clear that if any such company can sell its securities strictly within a state, and without going outside of the limits of a single state, the act does not apply. This will probably cover customer-ownership campaigns.

In the second place, short-term financing is expressly exempted.

If the utility has a small issue of $100,000, or less, it may get an exemption from the commission, under § 3-(b). If the aggregate amount is in excess of this, even the Federal Trade Commission cannot exempt it, and the company must be prepared to spend the necessary money to employ lawyers, engineers, and accountants to register under the act.

Of course, a private sale to a single purchaser is possible and would not come within the act.

A corporation dealing in its own stocks may be a dealer subject to the act. This appears from the debate, as follows:

"MR. BRITTEN—Is there anything in the bill that would prevent a condition of this kind? A big utility corporation, like the Cities Service Co., a highly regarded company—is there anything in the bill to prevent the company buying up its stock today and foisting it back on the public?

"MR. PARKER of New York—Under this bill it would be absolutely illegal. They could not do it, because they would immediately become dealers. The definition of a dealer governs that, and it covers their own stock. They would be dealing in their own stock."

ALL transactions involving a public offering where use is made of the mails or other instruments of interstate commerce, would come within §§ 12 or 17 of the act. Prudence would require compliance with its terms. This would apply to customer-ownership campaigns and to the sale of securities which have been passed upon and authorized by public service commissions or which would ordinarily be exempt under Blue Sky laws because they were listed on exchanges, or for some other reason. In every case, where there is a public offering and use is made of the facilities of interstate commerce or the mails, a new test is substituted for an old offense. It is no longer necessary to show fraud. It is sufficient hereafter to show negligence—a lack of due and reasonable care. Furthermore, the burden of proof is shifted to the defendant in civil actions, under § 12. This test even applies to securities exempted from registration under the new Federal Securities Act.

This statute will undoubtedly increase the tendency which has been such a striking development in the public utility industry during recent years of merging and consolidating. The business has become more and

¶ "PUBLIC *utilities are not directly discriminated against by the new Federal Securities Act. They are not given any preferential position under the bill. Their securities are not included in the definition of 'exempt securities.' In this respect, they differ from the carriers subject to the provision of § 20-a of the Interstate Commerce Act.*"

more interstate in character. The necessity for finding a wider market for securities has become more and more apparent, and these two factors have had a large influence in bringing about mergers. The cost of complying with this statute would be quite prohibitive to small companies with limited resources.

ANOTHER serious question for public utility companies under this act is how far they will be allowed by the public utility commissions to include the cost of compliance with this act in their operating expenses. The jealous way in which the commissions have treated cost of financing, now refusing to permit the company to capitalize it and earn on it, and now cutting it out of operating expenses, on the ground that it is excessive, suggests the difficulties which are quite likely to arise under this section, in spite of the clearly defined legal principles laid down by the courts.

Whether the act will have an adverse effect upon the character of boards of directors is a matter of speculation. Certainly, where a majority of a board have to sign a registration certificate, such a heavy responsibility is put upon them, that no responsible individual will be willing to serve without adequate compensation. Due care and good faith are a defense to a civil suit, under the act, for material misstatements or omissions of fact, and probably also in connection with wilful violation of the act. But, as already pointed out, there is an obvious attempt to change the common-law rule of liability, to give a cause of action to a person who did not even examine the registration certificate. Every officer, director, and responsible owner of a public utility, must, in order to protect himself, make a careful investigation of the facts stated in the registration application and in the prospectus, to avoid civil liability or penalties under the act.

In debate, it was stated by one of the sponsors of the bill, that accountants and lawyers were technical experts who might come within the class of those who are liable, and further:

> "The seller's legal status is that of a trustee. His obligation is tantamount to that imposed on one who occupies a fiduciary position."

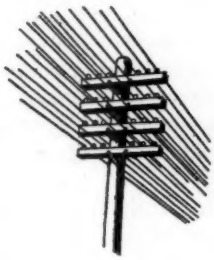
If the act is construed thus by the courts, a much more severe standard of care is imposed by this statute than the ordinary rules of negligence would require.

TO summarize: This statute is novel, because it enlarges the sphere of the Federal government, extends the definition of interstate commerce and of commodities in interstate commerce, is another example of the effort to use a congressional power granted for one purpose for the accomplishment of another purpose, and because it limits the freedom of contract.

It transfers the costs of the burden of investigating purchases from the purchaser to the seller, shifts the burden of proof, eliminates certain elements of causes of action, creates new crimes and new civil liabilities, makes additional persons responsible other than those who otherwise would be, extends the conception of trusteeship, creates additional costs and delays in financing.

It will undoubtedly change the practices of financing as business men with their technical advisers work out means to carry out speedily and effectively financial enterprises which cannot brook the delay incident to a compliance with the statute.

The statute has been skilfully drawn by a great student of constitutional law, with full recognition of the constitutional difficulties, and due regard to the decisions of the Supreme Court, and especially to the liberal dissenting opinions. It is planned to remedy a great evil, and to give greater security to investors. If it produces a sounder security market, it may be worth all that it costs. On the other hand, the difficulties which it creates for corporate financing are very real. As pointed out in a trenchant article in *Time*, of June 12, 1933, capital will be extremely difficult to raise for the multitude of middle-size honest companies, and it will be even more difficult to secure a "firm" deal with a banker, since twenty days must elapse between a banker's agreement to take the company's securities and the resale to the public. Neither the gambler nor the dealer in cat and dog securities will be discouraged; the former because he gets additional remedies in case of losses, and the latter because he has "little capital and less reputation to lose."



Interesting Facts about the Utilities

IN 1931—when the latest figures were available—698,786 farms in this country were electrified.

* *

TELEPHONE operators who are kept busy are more efficient than those who are idle part of the time.

* *

FOR more than one person at a time to enter a telephone booth is forbidden by law in some states.

* *

A FREIGHT train collided with a boat—during the recent flood of the Ohio river—at New Albany, Indiana.

* *

AIR transport passengers will shortly be able to communicate by radio-telephone over a radius of 3,000 miles.

* *

A CABLE from Berlin says that Chancellor Hitler has carried his campaign against the Jewish race into telephone exchanges. Instead of saying "D for David," "J for Jacob," "N for Nathan," German telephone operators now are required to say "D for Deutschland," "J for Joachim," "N for National," and so on.

THE UNCERTAINTIES IN THE LEGAL STATUS OF

Temporary Rates

PART I

During these days of rapid economic change and price readjustments the state public service commissions have been deluged with demands for temporary rate reductions, and the number of temporary rate orders issued has exceeded all records. Now the legality of some of these orders is being subjected to scrutiny; even the term "temporary" has not been defined by the statutes. In the following article the author sets forth some of the problems which the loopholes in the law are presenting.

BY JOSEPH C. SWIDLER

THE deluge of temporary rate orders in the past year has made of temporary rates one of the most immediate and pressing problems in the public utility field.

The commissions of Wisconsin, Oklahoma, New York, California, and many other states have seized upon temporary rates as the solution of the problem of satisfying the public demand for reduced utility rates without waiting the many months necessary to complete a final rate and valuation proceeding, and sustaining the resulting order in the courts. The temporary orders thus far issued are, however, probably only a minor prelude to the avalanche which may be expected—unless inflation should completely change the picture. There is an irresistible public demand for relief from the utility rate burden—a demand so urgent and extensive that formal rate cases are out of the question. In a single issue of PUBLIC UTILITIES FORTNIGHTLY,[1] it is reported that the Illinois Commerce Commission, for example, recently cited the twenty-seven largest electric companies in the state to show cause why their rates should not immediately be reduced; that the Arizona Corporation Commission on April 5th of this year began preparation for statewide rate reductions; that the board of estimate and apportionment of New York city directed the corporation counsel to begin immediate action to reduce electric, gas, and telephone rates, and appropriated $50,000 for the purpose. The far-reaching consequences of the mushroom growth of temporary orders entered and to be expected demand a much more critical examination of this problem than it has hitherto been accorded.

[1] For May 11, 1933.

IT is no less than remarkable, in view of the fact that most regulatory codes have for many years contained temporary or emergency rate provisions, how little attention has been paid the subject in the past—and all the more remarkable because these temporary rate provisions are so extremely vague. While the statutes, as judicially interpreted, have provided a fairly clear method of procedure for the entry of permanent rate orders, temporary rate orders have been left upon an uncharted course. No method of procedure was provided, no conditions precedent or subsequent were stipulated; nothing was prescribed by the legislatures except that, in brief, the respective commissions might, in an emergency, enter temporary or emergency orders. Even the terms "temporary" and "emergency" went altogether undefined.

Although on their faces blanket grants of power, no one supposes that temporary rates are matters purely in the discretion of the commissions. The rate-making power is too carefully guarded under our constitutional theories to permit the exercise of the power except under constitutional safeguards.

But what are these safeguards? And if they have not yet been formulated, what should they be?

DURING the war and in the decade of rising prices which followed, hundreds of emergency rate increases were granted. The reason why they provided no greater clarification of the issues which emergency rate orders raise is probably that in a period of prosperity and rising prices, consumers and their representatives were not impelled to challenge the validity of these increases. Moreover, consumers could in some degree be protected by conditioning the emergency grants on refunds if the rates should be found to be excessive. Perhaps the only major principles of law which developed were that emergency rate powers were not *ipso facto* unconstitutional and that prior valuations were not constitutionally indispensable to their exercise.[2]

The problem which now arises is whether the cases sustaining emergency orders granting increases will be qualified or distinguished in the case of emergency reductions, whether the courts will find distinguishing features between the two situations which require the application of different rules, either of substantive law or of procedure, in the case of reductions.

Perhaps the principal difference which may be urged is that the depression does not constitute an emergency for consumers within the meaning of the statutes. The courts have

[2] See, for example, La Crosse *v.* Railroad Commission (1920) 172 Wis. 233, P.U.R. 1921A, 22; Chicago R. Co. *v.* Chicago (1920) 292 Ill. 190, P.U.R.1921A, 77, followed in Hoyne *v.* Chicago & O. P. Elevated R. Co. (1920) 294 Ill. 413, P.U.R.1921A, 328; State ex rel. Southwestern Bell Teleph. Co. *v.* Public Service Commission (1921) (Mo.) P.U.R.1922A, 773, 233 S. W. 425, rev'd on other grounds, 262 U. S. 276, 67 L. ed. 981, P.U.R.1923C, 193; Kansas City *v.* Public Service Commission (1918) 276 Mo. 539, P.U.R.1919D, 422; Omaha & C. B. Street R. Co. *v.* State R. Commission, 103 Neb. 695, P.U.R.1919F, 307; O'Brien *v.* Public Utility Comrs., 92 N. J. L. 587, P.U.R.1919D, 774; New York *v.* New York Teleph. Co. (1921) 115 Misc. 262, 189 N. Y. Supp. 701, aff'd 202 App. Div. 796, 194 N. Y. Supp. 924; Oklahoma Gas & E. Co. *v.* State Corp. Commission (1921) 83 Okla. 281, P.U.R.1922A, 336; Muskegee Gas & E. Co. *v.* State, 81 Okla. 176, P.U.R.1920C, 806, 812. Contra: Cincinnati *v.* Public Utilities Commission (1917) 96 Ohio St. 270, 117 N. E. 381 (based on peculiarity of local statute).

frequently held that the plight of a utility may require emergency action, but whether the economic predicament of consumers has the same legal status was not until recently explicitly decided, although it has been passed upon by inference,[3] and the commissions have taken an affirmative answer for granted.

Recently the Wisconsin Telephone Company squarely raised the question. The Wisconsin Public Service Commission on June 30, 1932,[4] by emergency order reduced the rates of the Wisconsin Telephone Company by 12½ per cent.[5] The evidence in the record showing the existence of the emergency was elaborate and persuasive.[6] Economists of national repute had testified to the ravages of the depression, the sharp drop in employment, wholesale and retail prices, farm income, wages, salaries, and corporate earnings. The company nevertheless petitioned for a rehearing, citing as one of the grounds therefor that there had been no showing of an emergency within the meaning of the statute.[7] The commission, stating that it was still of the opinion that an emergency of utmost gravity existed, dismissed the petition,[8] but we have probably not heard the end of the matter yet, and it may, therefore, be wise to consider the questions involved.

IT is, of course, true that the level of rates of a given utility affects that utility differently, and generally more seriously, than it affects the utility's customers, for the reason that if there is any change in rates, the utility will gain or lose all of the difference, while the corresponding effect of the change on consumers will be distributed among them, with most consumers affected to only a relatively

[3] Indiana General Service Co. *v.* McCardle, 1 F. Supp. 113, P.U.R.1932D, 378, enjoining a temporary rate reduction but sustaining the emergency procedure.

[4] *Re* Wisconsin Teleph. Co. P.U.R.1932D, 173.

[5] Enforcement of the order was enjoined by a Federal district court, but the lower court was reversed on appeal to the United States Supreme Court (Public Service Commission *v.* Wisconsin Teleph. Co. P.U.R. 1933C, 264, 53 S. Ct. 514), and the case remanded. The restraining order was, however, continued in effect.

[6] Twenty-five pages of the commission's printed opinion (pages 101–126) were devoted to a summary of the evidence on this point, and to comment thereon. Aside from the testimony of economists on the national aspects of the depression, evidence was submitted on the Wisconsin situation by five departments of the state government, the economics department of the University of Wisconsin, and the Commission's staff.

[7] The Wisconsin provision (§ 196.70), a typical one, reads as follows:

"(1) The commission may by order when deemed by it necessary to prevent injury to the business or interests of the people or any public utility in case of any emergency to be judged of by the commission, temporarily alter, amend, or with the consent of the public utility concerned, suspend any existing rates, schedules, and order relating to or affecting any public utility or part of any public utility.

"(2) Such order shall apply to one or more of the public utilities in this state or to any portion thereof as may be directed by the commission, and shall take effect at such time and remain in force for such length of time as may be prescribed by the commission."

[8] See *Re* Wisconsin Teleph. Co. 2–U–35, March 10, 1933.

¶ "THE *temporary orders thus far issued are probably only a minor prelude to the avalanche which may be expected —unless inflation should completely change the picture.*"

minor extent. Many utilities could not have continued to function without the war and post-war emergency rate increases, whereas even substantial rate reductions may mean a saving of less than a dollar a month to the great majority of domestic consumers.

The question is, does this difference in the incidence of rate changes eliminate the emergency aspect so far as the public is concerned?

Perhaps the strongest reason for answering this question in the negative, whatever its surface plausibility, is simply that it offends one's sense of fairness that utilities should be entitled to a form of governmental relief which their consumers are denied. Such a doctrine would be unstatesmanlike in the extreme, and might cost utilities more in ill will and popular disaffection than the reductions themselves.

EVEN waiving the matter of policy, however, there are a number of sound reasons why the public should be entitled to emergency rate reductions in proper cases. For one thing, to commercial, industrial, and other substantial users of utility services, rate reductions may be as important as they are to the utility itself. Many businesses now are barely able to cover out-of-pocket costs, and in four years of depression have consumed whatever reserves they may once have had. As to many of such marginal concerns, faced with the necessity of reducing costs or going out of business, rate reductions may well be of sufficient assistance to obviate the latter alternative. Certainly this is an emergency as critical as any which entitles utilities to summary relief.

A second emergency phase of the problem, the effect of rigid utility prices in prolonging the depression and increasing its severity, was stressed in the testimony introduced by the commission in the Wisconsin Telephone Case. It was there pointed out that when wages and salaries decline but utility prices remain rigid, a greater proportion of the consumer's spending power is devoted to utility services, leaving a smaller proportion for other services and commodities, the producers of which, having curtailed markets, must curtail their own operations, thereby increasing unemployment and in other ways contributing to the depression. Again, utility costs enter into the cost of processing and manufacture, and if the price of the products of such manufactured and processed goods falls, production costs must also be cut if the business is to remain solvent. If utility prices do not decline, production costs cannot be sufficiently reduced, and continuance in business may become impossible. If there is any merit to this theory, and it is held by many eminent economists and business men, there are few matters of a more emergency nature than the reduction of excessive utility rates.

FINALLY, without speculation as to the effect of utility rates on business enterprises and the depression, there is still ample ground for supporting emergency rate reductions. To men who are unemployed and subsisting on charity, or whose wages and hours of labor have been so drastically cut as to leave them without money enough for the necessities of life, even a dollar or two means additional food

The Statutes Are Vague Concerning "Temporary Rate" Orders

"WHILE the statutes, as judicially interpreted, have provided a fairly clear method of procedure for the entry of permanent rate orders, temporary rate orders have been left upon an uncharted course. No method of procedure was provided, no conditions precedent or subsequent were stipulated; nothing was prescribed by the legislatures except that, in brief, the respective commissions might, in an emergency, enter temporary or emergency orders."

or much-needed clothing. As to these consumers, any rate reduction, however small, deserves emergency action.[9] If temporary rates are constitutional when they grant utilities additional revenue at the expense of consumers, they are no less constitutional when they operate to ease consumers of an excessive rate burden.

Assuming the constitutionality of emergency rate reductions, we are still confronted with the most difficult problem of all, namely, to determine what procedure is at once constitutional, sufficiently expeditious for the purpose, fair to the utilities, and calculated to win the confidence of the courts. So long as the courts can and will enjoin unreasonable reductions, commissions and legislatures must, in devising emergency rate procedure, keep in mind that the orders must not only be fair in result but must also be based on a sound procedure, for, as Mr. Chief Justice Hughes pointedly stated, while the courts are concerned primarily with the result, "when the legislative method is disclosed, it may have a definite bearing upon the validity of the result reached. . . ." And if the method is unsound or arbitrary, the courts will enjoin enforcement of the order, at least until they can pass upon the merits, thus defeating the very purpose of the emergency procedure. I have, therefore, attempted here to discuss desirable and appropriate techniques for securing emergency reductions which will not only

[9] Our discussion has assumed that emergency rate increases were granted only on a showing of an actual emergency, and while this was true in some cases (see La Crosse *v.* Railroad Commission [1920] 172 Wis. 233, P.U.R.1921A, 22) some courts had held that no actual emergency need exist. "Even though present financial conditions . . . do not show a situation which could be technically denominated an emergency, yet if they do show a situation which makes it altogether probable that the past and present rate is insufficient to yield a revenue which will pay that fair average return which the law supposes, the commission is empowered, and it may be its duty, to permit a temporary rate, limited to the time required for making an investigation and finding of the value of the property." Conversely, it would seem that under this rule a commission was empowered, and that it might be its duty, to reduce rates by temporary order whenever rates were excessive, depression or no depression.

be sustained after review, but which will also be safe from injunction.

WHATEVER restrictions are ultimately placed on commissions, their power to proceed with emergency cases without completing valuations (that is, valuations based on field appraisals) must be protected. It has frequently been stated, and with much reason, that the valuation rules prescribed by the Supreme Court have made rate regulation almost hopelessly cumbersome and expensive. The expense of single rate cases has not infrequently run into seven figures, and anywhere from a year to a decade or more may be required before commissions and courts have finally passed upon them. Students of the problem have long insisted that reproduction cost valuations ought to be abolished, whatever its merits in determining value, if for no reason than that economical and efficient rate regulation is impossible under its requirements.

WHAT has been true of rate cases generally is true *a fortiori* of cases involving temporary rates. The income of wage earners has shrunk by more than half since 1929.[10] More than ten millions are unemployed, and many of them, together with their dependents, are destitute and dependent upon public or private charity. Many millions more are only partially employed and practically all wage earners have had drastic reductions in their income. Only prompt relief can help them, and such relief is impossible if a formal valuation is a prerequisite.

Either historical cost or fair value derived from historical cost by adjustments giving effect to changed price levels would seem to be sufficient for the purpose of temporary orders. In the Los Angeles Gas and Electric Case,[11] recently decided by the Supreme Court, two rate bases had been found by the commission, historical cost and a fair value figure obtained, not by assuming a hypothetical reproduction program, which would have required extended field appraisals, but by taking actual cost and adjusting it to correspond with price changes by assuming that the present level of prices had obtained during the whole life of the property. This latter method is similar to the use of index figures, except that it permits the use of specific quotations instead of averages. The order (a final order reducing rates by 9 per cent) was sustained, both the historical cost and fair value figures being held to be competent evidences of value.[12] The court said:

> "In determining the weight to be ascribed in the instant case to historical cost as shown by the evidence, the outstanding fact is that the development of the property had, for the most part, taken place in a recent period. . . . Thus the additions and betterments which brought the historical cost of the fixed property (with land at current values) up to $58,842,187, as found by the commission at the end of 1929, took place in the ten preceding years and approximately two thirds of the latter amount appears to have been the cost of additions and betterments after January 1, 1922, as the rate base taken at that time was approximately $20,000,000. . . . We have had occasion to take judicial notice of the high level of prices of labor, and materials pre-

[10] David E. Lilienthal in "Regulation of Public Utilities during the Depression" (1933) 46 Harv. L. Rev. 745, 752, cites figures from the U. S. Bureau of Labor Statistics showing that payrolls in November, 1932, were only 38.6 per cent of the average for 1926.

[11] Los Angeles Gas & E. Corp. *v.* Calif. R. Commission, P.U.R.1933C, 229, 53 S. Ct. 637.

[12] The rates had been estimated to yield 7.7 per cent on historical cost and 7 per cent on fair value.

> vailing not only from 1917, as incident to the war, but also in 1922 and 1923 and that there was no 'substantial general decline' in such prices from that time to 1926. . . . During these years the historical cost of the company's fixed property increased by additions and betterments to over $52,000,000. . . . There can be no question that the cost of additions and betterments from 1926—in the period just preceding the commission's order under review—was good evidence of their value at that time. And, so far as prices of labor and materials are concerned, we find no warrant for a conclusion that there had been any change in levels during the years that intervened from the first valuation in 1917 which it made unfair to the company, in fixing rates for the future, to take the historical cost as found by the commission as evidence of the value of the company's structural property at the time of the rate order. On the contrary, it clearly appears that, by reason of the downward trend, the prices for labor and materials, which were reflected in that historical cost were higher than those which obtained during the later period to which the prescribed rates apply." (Citations omitted.)

THERE was no specific approval of the method used in computing fair value, but the court rejected the company's fair value estimates based on a hypothetical reconstruction program as extravagant, and accepted the commission's figures as reliable. In view of the vigorous criticism of the commission's valuation methods in Mr. Justice Butler's dissent, the opinion of the majority must be taken as a tacit but considered approval of such methods under conditions such as there existed.[13]

This conclusion is reënforced by the court's holding to the effect that it would not review the methods used by the commission, but only the results—a holding, it is true, partially offset by the statement that the method might have a "definite bearing" upon the validity of the result. It said:

> "We do not sit as a board of revision, but to enforce constitutional rights. San Diego Land & Town Co. *v.* Jasper (1903) 189 U. S. 439, 446, 47 L. ed. 892, 23 S. Ct. 571. The legislative discretion implied in the rate-making power necessarily extends to the entire legislative process, embracing the method used in reaching the legislative determination as well as that determination itself. We are not concerned with either, so long as constitutional limitations are not transgressed. When the legislative method is disclosed, it may have a definite bearing upon the validity of the result reached, but the judicial function does not go beyond the decision of the constitutional question. That question is whether the rates as fixed are confiscatory. And upon that question the complainant has the burden of proof and the court may not interfere with the exercise of the state's authority unless confiscation is clearly established."

It must be emphasized that these rulings were made with regard to a final rate order, and, therefore, do not necessarily impose minimum conditions as to temporary orders, where more summary procedure would doubtless be constitutional. But if the methods approved are valid in final rate cases, they may certainly be taken as fair and valid in temporary rate cases. Reductions made on either of the bases used by the California commission ought to be expeditious enough for emergency rate cases, at the same time that they are safe from constitutional attack. Nor does it seem likely, in view of the sweeping language of the opinion, that the use of index figures themselves are barred where, as in the case of the Los Angeles Gas and Electric Corporation, most of the property is of relatively recent construction.

[13] Of course, the commission's fair value method can be of maximum assistance only where there is available a reliable inventory, or where it is possible for the commission and the utility to stipulate to an agreed inventory. Otherwise field work would be necessary to determine the inventory.

The second and concluding instalment of this article will appear in the following number of this magazine—out August 17th

Remarkable Remarks

"There never was in the world two opinions alike."
—MONTAIGNE

ROY B. WHITE
Railroad man.

"Air transport lines or motor truck services are no bugaboo to railroad men."

GEORGE B. CORTELYOU
President, Consolidated Gas Company, New York.

"The plain truth is that taxes cannot longer continue their upward course without halting the downward course of rates."

PAUL H. DOUGLAS
Professor of Industrial Relations, University of Chicago.

"Utility managers who are responsible to the interests behind them cannot be content with 'fair' profits which effective regulation would give."

E. K. MURRAY
Director, State Department of Public Works, Washington.

"Regulation is on trial at the present time, and if it fails in connection with public utilities, it will not mean the end of regulation, but it will mean public ownership."

FLOYD W. PARSONS
Writer and economist.

"The railroads in the next decade will tend to become the sole carrier on long-haul business. It will be a time of cooled cars, sealed windows, cushion trucks, radio facilities, ultra-violet glass windows, streamlined bodies, no dust, and a great reduction in noise."

ALEX DOW
President, Detroit Edison Company.

"We are going to drill it into our customers until they understand it—that indirect taxation of themselves through the lighting companies is in most cases a departure from mental honesty by the taxing powers—an evasion of criticism that might hurt political careers, and that it is up to these customers of ours to make the protests that will take the taxmasters off their backs as the tax earners."

BERNARD F. WEADOCK
Executive Director, Edison Electric Institute.

"To date, the effect of the Federal Trade Commission's investigation (of the utilities) has been to emphasize the industry's bad points—many of which have been corrected since the investigation began—and to pass over the good points, which are in the majority, as a matter of course. All that our industry asks is that the facts about it be completely and accurately investigated and reported."

The Effect of the Recovery Program on Utility Securities

The Views of a Country Banker

Will the value of the stocks and bonds of the power companies vary with the intent of Uncle Sam to enter into competition with private industry?

As told to
FREEMAN TILDEN

WELL, Congress has adjourned and gone home, and this is as good a time as any for a harried country banker to burst forth again in your pages, after a long absence. A lot of water has trickled through the dam since I last saw you. A lot of things I had feared came true; and a lot of things I never thought of came truer. There was a time last spring when we country bankers didn't know whether we were operating banks or fiduciary speakeasies. Anyway, we got padlocked.

If you'll bear with me a few minutes, I want to recollect some of the sour prophecies to which I lent my acid voice, back over the past two years. I don't want to crow. I've lost my crowing voice. But it may help us to get set in the direction of something promising for the future if we recall what we were talking about before the lightning struck.

YOU remember, maybe, that I seemed "sot" in my ways about two factors in the investment world. One of them was, that in the general set-up of holding companies, whether public utility or whatever, they were good things for the man who was dealing with other people's money to stay away from.

The other was, that something would have to be done about the carefree accounting methods employed by holding companies.

I recall very clearly that, in respect to the latter point, I was roundly accused of being a coarse gentleman with a metallic heart, for indulging in such ungracious comment. It seemed to some folks that it was perfectly all

right for the directorate of a company to go out and pick their accountants —to "roll their own," so to speak, in the parlance of the cigarette smoker. Any little funny capers on the balance sheets must be excused, thought these optimists, because the directors were a bunch of good fellows who meant well and whose prosperity was the prosperity of stockholders. The stockholder himself, being a pretty dumb animal, and not having sufficient gumption to take a personal interest in the stock in which he had put his money, was to be safeguarded on the general rule that your business is my business, and what's good for you is good for me. There was, of course, some considerable truth in this latter remark. But I thought then, and I think now, and I shall always think, that the stockholders should choose their own accountants, and that the accountants should be responsible to them, and to them alone: and furthermore, that the balance sheet should tell the truth, the whole truth, and nothing but the truth, so help me God. And if you want proof of the soundness of these principles, consult your financial sorrows, my friends.

On the other hand, I was strong for the bonds and preferred stocks of well-conducted operating companies, as investments for the individual, the corporation, and the trust fund, and in spite of everything, I have seen no reason to shift my position—though the exigencies of financial war, I admit, have shifted my position several times against my will. The only talking point against this position was an outbreak, within the state political circles, of a mad rush to do something against utility companies just because they were utility companies, and in spite of the fact that the state regulatory commissions were almost invariably giving the public ample protection, and that rates for the most part seemed equitable. This has not happened. The wisdom of distributing preferred stock among employees and consumers has been well justified. The decline of earnings has been for the most part merely coincidental with general deflation, and all things considered, the management of sound operating companies has, in this stressful time, been of a high order. We ought to say, too, that in the general scaling down of real wages, and the necessity for cutting operating expense to the bone, the willingness of the average employee to take his medicine, and his ability to understand the conditions, have done credit to this high class of laborer and salaried employee.

It would be foolish to say that there are not dangers looming on the horizon for operating utility companies in certain sections of the country. It depends, among other things, upon how real the intention of the present government is, to put the government into the power business. If you ask me how real I think this intention is, I say I don't know. I might like your opinion fully as well as my own. I suppose we have a dictatorship in this country. You can call it anything you please; the word doesn't damage my eardrums a bit. Mr. Roosevelt has more power this minute, in my judgment, than has been in the hands of any man since—well, since the flush days of the Cæsars.

I see nothing to prevent him from putting the Federal government into any business he pleases, before next December. All he needs is to declare a crisis. In a crisis, anything goes; especially if you announce the crisis over the radio.

Mind, when I say these things, I am not in the least concerned with politics. A country banker can hold whatever political tenets he chooses, but he has no right, as a handler of other people's money, to be swayed in his investment judgment by such opinions. He may properly consider one fact alone—which is the ultimate safety of entrusted money. Even return on that money is secondary.

It so happens, however, that even if the banker rises wholly above his own political opinion, it does not follow that government can do so. There has just retired, to its several well-mortgaged homes, the most amazing collection of ineffectives and top-spinners ever gathered together under one roof—not excepting Madison Square Garden during a 6-day bicycle race.

I refer pleasantly to the Congress just adjourned.

Except for a few minutes, when they bit their finger nails excitedly over the soldier-vote back home, Congress presented the President a package of checks signed in blank. I am not, as a banker, worried about that—whatever I might think of it as a citizen. I think I should have been more worried if they hadn't. I think I prefer to pin my hopes to one man, thinking of one political future, rather than to a concourse of bareback riders, thinking of several hundred political futures.

Nevertheless, we are now about to see what we shall see, and it might affect my investment ideas profoundly. I must look at the map. I must look back at the campaign speeches made by Mr. Roosevelt before he was elected President. The President is one of the most astute politicians this country has ever seen. When I say that, I mean not the slightest disrespect. A consummate politician may also be a statesman. What a changed picture in this country there might have been if Mr. Hoover had possessed the amazing ability to play the political game, which is the property of Franklin Roosevelt!

In the Puget Sound region, for example, Mr. Roosevelt seemed inclined in his speeches to favor new power development, presumably with a strong leaning toward government operation. If I am a little vague about it, I suggest that it was because the speaker was a little vague. It was a time of campaign speeches. Those have a penchant for protective coloration. In other localities the speaker was—what shall we say?—

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¶ "It *would be foolish to say that there are not dangers looming on the horizon for operating utility companies in certain sections of the country. It depends, among other things, upon how real the intention of the present government is to put the government into the power business.*"

not so "hot" for putting the government into competition with private enterprises.

But I lay my wishful finger against my forehead and study the map. Have you observed how, in the past few years, investors have been "driven in" so to speak, geographically and in respect to the *kind* of businesses involved? Investments which were absolutely well judged at the time they were made, have had a terrible passion for going wrong owing to changes that could not possibly have been foreseen. The old lazy days of sanguine investment, based upon a set of "fundamental rules" have passed—maybe forever. Now, we fellows have not only to observe the fundamental rules, but we have to know our geography, our political tendencies, and public taste. So I look at the map, I say, and I am going to cling to my persuasion that sound operating utility companies present about as good material as any, but I am choosing what I think the least vulnerable spots against any changes and any attack.

THE other day I had some real pleasure—and real pleasure in the investment world is not too common, heaven knows!—in going over the little portfolio, so to speak, of a trust fund left fourteen years ago by a public-spirited citizen, in behalf of a school. Except for some money in savings banks, the securities turned over to the trustees were those of the testator's own sagacious choosing. After due consideration, though there was nothing to prevent the trustees from making such changes in the investment as they saw fit, they decided to make no changes whatever. There was no common stock represented in the portfolio, only preferred and bonds. Except for one bond which matured, and two others that were called, the set-up lies just as it did. Most of the bonds were first liens on operating utility companies; there was one railroad bond only, and this is on the best railroad in the country. More than half of the preferred stock is that of operating utility companies, and not one of the companies represented has faltered during the depression. It is true that the market value of the whole is somewhat below purchase price, but this is of no importance, as there is no question of marketing involved.

Incidentally, when we met the other day (I am one of the trustees) somebody remembered the fact that there was a feeling, fourteen years ago, that it might be wise to sell half the securities and put the amount accruing into savings banks, accepting a smaller return in consideration of increased security. At that time nobody would have said that it was not a prudent, even if it were an over-prudent, move. Yet two of the savings banks in which we might very well have deposited are at this moment operating under a conservator. A conservator is a receiver who rides in a Ford, I assume.

I don't know what the situation may be a year from now, but for the present we are mighty well satisfied to let those preferred stocks ride. It might be worse.

WELL, somebody may say, would you be content to have the same investments in your bank portfolio?

The answer is no. Not at the moment. But the position is entirely

different. In common with all the rest of the poor blighters who are operating banks on their graying hairs, we have been pushed into a degree of liquidity that makes it impossible to do anything we might like to do. If it were not for the fact that our mortgages (on the savings-bank side) average only a trifle over $1,000 per mortgage, and that we have a miraculously small number of defaults and foreclosures, we might as well be playing marbles as running a bank. We actually shouldn't be getting a new dollar for an old one. We paid depositors in the savings bank 4 per cent at last meeting, but it may be the last time in a long while that they receive so much. What the Glass-Stegall act is going to do to us I don't know. Maybe we'll have to liquidate. But of course I'm not asking you to worry about that.

No doubt you will see from all this that I am friendlier today, from an investment standpoint, to the bonds and preferred stock of operating utilities, than I have been at any other time. I qualify my enthusiasm in respect to *locality*. I think it more important than ever, too, to know something about the management, and I am not merely thinking in terms of what we call honesty, when I say that. There are other considerations. It must be understood, further, that when I refer to bonds, I am thinking of their merit as mortgages; as to whether they represent sound value. For all I know we may come to a drastic inflation, in which the owner of any fixed income security, in mortgage form, may be out of luck. But there's no use considering that point here. In that case, all capitalists, including the holder of an insurance policy and the laborer who has poured his hard-earned dimes into a savings bank, or a coöperative loan association, will go down together in one grand gurgle.

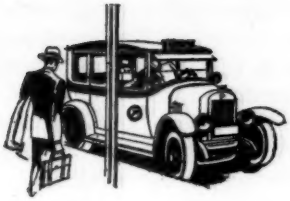
If we indulge in festivities akin to those which attended the German mark after the War, there won't be any use worrying about anything.

How Safe Will Public Utility Investments Be in *Your* State?

ANY answer to this question would be incomplete unless it took into consideration one of the most important of the factors that are now determining utility security values—***the present standing of regulation in that state.***

Is the public service commission competent? Is it permitted to perform its functions in a manner that safeguards the interests both of the utility ratepayers and of the security owners? Or is it involved in political controversy and hamstrung in the performance of its duties? Is it dominated by conservative, liberal, or radical influences? What is the attitude and temper of the people toward government ownership projects in that state?

To reply to these and innumerable other equally searching queries, a survey is now being completed that will be essentially factual in character, and for that reason of practical guidance to both present and prospective utility security owners. A summary of this survey will appear in a coming issue of this magazine.



The Taming of the Taxicab

Measures which are being taken throughout the country to bring this wildcat carrier, which has been playing havoc among the established transportation services and cutting its own throat in the process, under control of the state public service commissions.

By JOHN J. GEORGE

Among the forms of motor transportation only one type, the private contract motor carrier, is of more concern to state regulatory bodies just now than are taxicabs.

Prior to 1931 Rhode Island, Connecticut, and Pennsylvania undertook state regulation of taxicabs as common carriers.[1]

During the past two years cut-rate competition of taxicabs among themselves, as well as with street cars and busses, has become especially pronounced in many localities; notably in Bridgeport, Hartford, New Haven, Philadelphia, Baltimore, Washington, and Omaha. In some areas the cheap taxicab has put the street cars and busses out of business. Individually, the operators would like to stop the competitive struggle, but each appears afraid to start the stopping for fear he will perish at the hands of the ruthless spirits who will not desist. The taxi-riding public likes the contest, and gleefully enjoys the rides offered at little cost.

For several months the Maryland commission had tried to compel the Sun Taxicab Company to provide liability and indemnity protection, only to learn from the court that no such power reposed in the commission. But the statute of April 2, 1931, confers on the commission complete jurisdiction, including the requirement of liability protection, over taxicabs in Baltimore only.

Following a chaotic condition of long standing and increasing severity in Washington, D. C., Congress passed, and the President signed, June 2, 1932, a comprehensive act changing the whole licensing system for taxicabs in District of Columbia. In the other jurisdictions here surveyed taxicabs have been brought under regulation by interpretation of statutes relating to public service companies, public utilities, or motor carriers or by the continued application of stat-

[1] For this and all subsequent footnotes, see pages 156 and 157.

utes enacted before the year 1931.

To regulate taxicabs at all satisfactorily state authorities have found it advisable, if not indispensable, to establish the common carrier character of this form of motor transportation. The Pennsylvania Superior Court has ruled that the term "public service company" as used in the law of 1913 includes all common carriers of persons or property between points in Pennsylvania over, under, or on land, water, or both; that "points in the state" does not mean fixed points exclusively, and that operation between points need not be over fixed routes.[2]

In City Cab Corp. *v.* Patrick,[3] the supreme court of District of Columbia sustained the District commission view that taxicabs are public utilities under the Congressional Act of 1913, and that they are subject to regulation as public utilities. Relying on previous taxicab decisions, especially those in District of Columbia, the Nebraska commission recently promulgated regulatory rules for taxicabs on the ground that taxicab control comes within commission authority to regulate motor carriers. Declaring that taxicabs are common carriers this commission subjects them to control as to rates, service, and general administration; it held further that state exercise of power over taxicabs does not preclude municipal exercise of police power over them.[4]

From a recent decision in Maine we learn that a taxicab operator who almost daily for a period of months makes a practice of running his vehicles along the route of a motor common carrier just a few minutes ahead of the latter's vehicles and picks up the passengers thereby becomes subject to statutory regulation by the commission.[5]

Taxicabs which get their passengers not by soliciting but by dispatching vehicles from the garage on receipt of telephone calls for service do not thereby remove themselves from the common carrier class, said the Pennsylvania commission. This body further said that common carrier character of taxicab service is not determined by the length of time the vehicle is in use nor by the distance traveled as shown by the meter.[6]

Because of disastrous competition in Omaha the Nebraska commission in May, 1932, announced that all taxicabs operating in Omaha must obtain certificates of public convenience and necessity, although city ordinances put no restriction on the number of taxicabs and made no effort to regulate them. Regulation of taxicabs in Omaha does not violate equal protection, the commission ruled, holding that there was a real distinction between the Omaha area and the rest of the state.[7] In holding that they could require the certificate of public convenience and necessity as a condition to instituting operation,[8] the commission recognizes that those already operating are entitled to certificates without proving public convenience and necessity as a basis for obtaining the authorization. Well-established is the doctrine that *bona fide* operation on effective date of regulation entitles the operator to a certificate as a matter of right.[9]

Common carrier certificates must be obtained in Pennsylvania in advance

for operation of taxicab service by dispatch of vehicles on telephone call; operation by this method rather than by cruising for passengers does not divest the taxicab of its common carrier character and this method of operation without a certificate is illegal.[10]

Chairman West of the Maryland commission is reported as saying a permit must be obtained for each taxicab operated, and that drivers be registered, and prove that they either own the vehicles operated or are employed by the owner.[11]

The 1932 act for District of Columbia uses "license" as the form of authorization. To eliminate dealer-renting of vehicles to drivers who operate on their own responsibility without liability protection, this act authorizes the license to only the owner of the taxicab or his agents.[12]

Certificates have been denied by the Pennsylvania commission for operation of taxicabs in Philadelphia. Court review of the commission decision [13] was obtained by the applicant on grounds that: (1) the commission had no jurisdiction over taxicabs operating call and demand service; (2) evidence did not sustain the commission finding that taxicab service in Philadelphia was adequate to accommodate the taxi public; (3) evidence did not sustain the conclusion that the venture would not prove financially justified; (4) the commission considered facts assertedly in its knowledge for which the record shows no evidence in support; (5) to taxicabs should not be applied the doctrine that destructive competition between utilities is hostile to public interest. But the superior court sustained the validity of the commission action denying the certificate.[14]

Since the Connecticut regulatory statute of 1929 was enacted safeguarding the granting of taxicab certificates, much unnecessary duplication of service has been eliminated.[15]

WHEREVER no serious efforts have been made to regulate taxicabs, we must assume the controlling factor to be the view that free competition in taxicab service is in the public interest. Particularly does the certificate of public convenience and necessity requirement tend to eliminate unwarranted duplication. Restrictions against driver-rental taxicab service as instituted in District of Columbia in 1932, while justifiable on grounds of responsibility in operation, do tend toward regulated monopoly.

That destructive competition of taxicabs among themselves and with other forms of transportation is detrimental to public interest is stressed in Pennsylvania [16] and in Nebraska. In the latter jurisdiction the state commission holds regulation warranted by its obligation to the people[17] to protect the low cost transportation furnished by street railways against disastrous competition from taxicabs.[18] However, limited competition is favored by

¶ "To *regulate taxicabs at all satisfactorily state authorities have found it advisable, if not indispensable, to establish the common carrier character of this form of motor transportation.*"

the decision of the Wisconsin commission denying a street railway permission to discontinue its bus service because of alleged losses resulting from cut-rate taxicab operation, the commission pointing out that the city and the applicant had a one-year agreement for only curtailment of bus service offered by the traction company.[19]

In its taxicab order of November 6, 1931, the District of Columbia commission[20] included specifications as to type, appearance, and maintenance of cabs; and also the qualifications, conduct, and appearance of drivers.

Unlawful is the practice of taxicabs in starting their operation from points other than the stands specified in their certificates, declared the Pennsylvania commission.[21] The 1932 act for District of Columbia requires that taxicab stands be determined by a joint board of District commissioners and public utility commissioners. It appeared that existing stands would be continued.[22]

Taxicab service rendered only on telephone call possesses the same legal status as does cruising taxicab service in Pennsylvania. Resorting to the former practice does not divest the operator of his common carrier character. He cannot offer such call service in that jurisdiction without a certificate of public convenience and necessity.[23]

A leading service case arose in Philadelphia. The applicant for certificate introduced to the commission exhibits representing surveys in twenty largest cities in the United States showing that in 15 per cent of these there were more taxicabs operating per unit of population than in Philadelphia, and that Philadelphia had less than one half as many taxicabs per unit of population, and only three fifths as many per unit of territory as the average of these twenty cities. The applicant also established that from 1927 to 1929 the number of taxicabs authorized to operate in Philadelphia declined from 2,142 to 1,317. Further, he offered testimony that many customers had complained to him of their inability to get a cab.

Protestants offered testimony that taxicab service in the city could be obtained reasonably promptly, and evidence was introduced that Yellow Cab Company and Quaker City Cab Company had a large number of taxicabs in reserve; they further testified that since 1927 there was a decrease in the number of taxicabs operated in the United States.

The commission found that the existing service was adequate and denied the certificate. On appeal the state court refused to interfere with the commission decision.[24] This case emphasizes the trend toward regulated monopoly in taxicab service.

Safety of operation is a matter of some importance in the regulatory program. Qualifications of drivers in District of Columbia, the maintenance of equipment in the same jurisdiction, and the requirement of liability protection as a condition to operation, all look to safety of operation. To require this liability protection constituted a chief motive in establishing control in Maryland in 1931.[25]

The District of Columbia commission early in 1931 undertook to re-

Unregulated Competition with Recognized Transportation Agencies Are Compelling Classification as "Common Carriers"

"THROUGH drastically reduced rates, taxicabs have popularized individual transportation and created cutting competition with previously recognized common carriers. Because of this competition, the meaning of common carrier has been expanded to include taxicabs, an agency of transportation hitherto disregarded by state regulation because of the locus and character of the service offered."

quire taxicabs to file liability insurance or statement of financial ability to pay for accidents arising in course of operation. The local supreme court granted injunction against such a requirement, and the district court of appeals affirmed the decree. It was held that the commission had not been authorized by Congress to so require liability insurance, and that as a mere administrative body the commission could not set up this safeguard.[26]

THE rate question has constituted the chief motive for subjecting taxicabs to common carrier control in Washington, and it has played an important part in the development of regulation in Connecticut.

The Nebraska commission can require that meter rates replace flat rates and to that end may direct all taxicabs to be equipped with meters.[27] Connecticut likewise specifies taxicab meters.[28]

During 1931 taxicabs in Washington operated on flat-rate basis. Rate-cutting was practiced to the degree that the fare dwindled to only 20 cents to any point in the city. The commission considered zone rates impractical from a service and accounting standpoint but on November 6th ordered a return to the metered rate within sixty days.[29] Operators were loath to comply, and asked for a rehearing on the return order. Meanwhile the house of representatives passed a resolution asking the commission to withdraw the return-to-meter order. The commission refused to do so, and Representative Blanton became so wrought up that he offered a resolution to cut off the salary of the commission if it insisted on the return to taximeters.[30]

The dissatisfaction of the operators with the commission order led to review by the District Supreme Court whose opinion in relation to meters stated: (1) under act of Congress meters may be required where rates are fixed on mileage basis; (2) not so requiring meters for street cars and busses does not discriminate against taxicabs, nor is it discriminating to require meters for taxicabs not operated on an hourly basis; (3) invalid is the argument that the order to install meters would be a heavy and

unnecessary expense to the operators; (4) likewise of no weight is the contention that the meter requirement would cause some of the drivers to lose their jobs.

To the flat zone rate question the court said:

(1) The flat zone rate induces drivers not to serve passengers near zone boundaries; (2) such a rate makes difficult satisfactory telephone call service; (3) leads to frauds and disputes; (4) hinders the commission in getting proper accounting data from the operators; (5) encourages cruising of taxicabs in the congested areas. For these ample reasons the court affirmed the commission order.[31]

A taxicab operator whose tariff schedules filed with the Pennsylvania commission call for metered rates violates the public service company law by offering to transport passengers at flat rates to ball parks and boxing rings.[32]

Power to fix utility rates is denied the Nebraska commission, but that agency has asserted its authority to fix minimum and maximum rates for taxicab service.[33] Authority to fix minimum and maximum rates is possessed by the Connecticut commission and this power has been exercised in establishing for Bridgeport, Hartford, and New Haven a rate of 20 cents for first quarter mile and 10 cents for each additional quarter; and a 30-10 rate for Waterbury and Meriden.[34] Much opposition arose from this fixing of rates. Independent operators objected especially to the 20-10-cent rate, and insisted on a 15-5 rate instead. On appeal they got a decree staying the commission order for the 20-10 rate, and operation at a reduced rate was resorted to.[35] On July 27, 1931, the commission granted the lower experimental rate desired by owners of 80 per cent of the taxicabs in Hartford; 20 cents for first two-fifths mile and 5 cents for each additional fifth.[36]

More comprehensively has spoken the District of Columbia Supreme Court on the rate question. In City Cab Co. *v.* Patrick we hear the following argument:[37]

(1) It is not necessary for the commission to evaluate taxicab property in order to fix rates; (2) commission order directing the retention of the metered zone system was based on evidence at hearing announced by the commission and attended by all taxicab operators who wished to attend; (3) valid is the commission finding that prevailing rates discriminated against very short-haul passengers and in favor of long-haul passengers; (4) it is impossible to fix zones which are not discriminatory in the District; (5) a rate of 25 cents initial charge is admittedly discriminatory against very short-haul passengers, but not sufficiently discriminatory as to be illegal; (6) operating expenses preclude a flat zone rate of 20 cents in Washington; (7) tenable is the commission finding that taxicab rates are so low as to bring low wages for drivers, and to require such long hours as to threaten their efficiency. Thus, the court sustained the zone basis for metered rates, and approved 25 cents as a minimum taxicab rate.

But there is no legal taxicab fare in Washington, said Traffic Court Judge McMahon in dismissing a charge against a cab driver on complaint that he was overcharging his

customer in the taxicab.[38]

Factors entering into the rate base for taxicab operation include street topography, density of population, and the degree of taxi-riding habit, acknowledges the Connecticut commission.[39]

What is not a fair rate of return appears in Hoffman *v.* Public Service Commission,[40] where the court approved commission decision that operation of Ford taxicabs would prove a loss where the evidence showed the operation would yield less than 1½ cents a mile and Fords would attract less patronage than would larger taxicabs.

The cost of operating taxicabs in District of Columbia is 10 cents a mile, and the commission found that 40 per cent of taxicab mileage did not produce revenue.[41]

TAXICAB developments to date warrant the following conclusions:

First; the term "motor common carrier" is no longer restricted to those vehicles operating between fixed points and over definite routes, and serving up to capacity all who offer. Through drastically reduced rates taxicabs have disclaimed being conveyances for the few; they have popularized individual transportation and created cutting competition with previously recognized common carriers. Because of this popularization and competition, the meaning of common carrier has been expanded to include taxicabs, an agency of transportation hitherto disregarded by state regulation because of the locus and character of the service offered.

Secondly; state authority over taxicabs is being asserted in a slowly increasing number of jurisdictions; that by interpretation of existing utility or motor transportation statutes or by legislation *de novo* the common carrier character of taxicabs is being recognized.

Thirdly; that authorization to operate may take form as a permit, license, or certificate of public convenience and necessity.

Fourthly; that those taxicabs in *bona fide* operation on effective date of regulation as common carriers cannot be required to prove public convenience and necessity as basis for the certificate, but are entitled to it as a matter of right.

Fifthly; that the trend in taxicab regulation, as in other forms of transportation is definitely toward regulated monopoly.

Sixthly; that regulatory bodies possess a wide range of authority over service and safety.

Finally; that most of the contest has centered around the problem of rates; that power to require metered rates is well established, but that little progress has been made toward the establishment of a rate structure.

¶ "STATE *authority over taxicabs is being asserted in a slowly increasing number of jurisdictions; by interpretation of existing utility or motor transportation statutes or by legislation* DE NOVO *the common carrier character of taxicabs is being recognized.*"

MUNICIPAL control of taxicabs has its limits, and an increased state regulation can be expected, particularly in metropolitan areas. We may inquire what a future program of state control should include.

First, the certificate of public convenience and necessity should be required to operate. Since *bona fide* operators on effective date of regulation must be granted the certificate as a matter of right, it is highly advisable from the viewpoint of economical service to institute the certificate requirement at a time when economic forces have reduced the number of taxicabs in operation. As future demands require additional service, public convenience and necessity [42] can be interpreted to permit further authorizations. Public convenience and necessity *is* [43] more difficult to measure in dealing with taxicabs than with motor busses, and it requires a more comprehensive and specialized consideration of the relevant factors.[44]

Secondly, the transfer of a certificate must be approved by the granting authority, which should also be empowered to revoke certificates for violation of valid regulations.

Thirdly, liability protection is indispensable. This may take the form of a bond, insurance policy, or a critically adjudged and approved financial ability of operator to pay for damages and injuries arising in the course of operation. Accepting financial ability is often risky procedure; but this in lieu of bond or insurance policy encourages efficiency of drivers and thereby promotes safety.

Fourthly, metered service should be prescribed; but because of wide divergence in factors affecting cost of operation in different localities, I think fixing of the rate scale should be left to local authorities, subject to supervision and modification by the state commission.

Citations

[1] The developments in these three states during the first two years I presented in "State Regulation of Taxicabs," *Electric Railway Journal* (now *Transit Journal*), March, 1931.

[2] Hoffman *v.* Public Service Commission (1930) 99 Pa. Super. Ct. 417, P.U.R.1931A, 122.

[3] P.U.R.1932C, 1–20.

[4] *Re* Yellow Cab & Baggage Co. P.U.R. 1932D, 121.

[5] Maine Central Transp. Co. *v.* Bowie, P.U.R.1932E, 409.

[6] Yellow Cab Co. *v.* Steffen, P.U.R.1932C, 265.

[7] *Re* Yellow Cab & Baggage Co. P.U.R. 1932D, 121–137.

[8] *Ibid.*

[9] My "Motor Carrier Regulation in the United States," (Band and White, Spartanburg, S. C.), 70, 71.

[10] Yellow Cab Co. *v.* Steffen, P.U.R.1932C, 265.

[11] PUBLIC UTILITIES FORTNIGHTLY, April 30, 1931, Special Section, 564.

[12] PUBLIC UTILITIES FORTNIGHTLY, August 4, 1932, Special Section, 168.

[13] P.U.R.1930D, 178.

[14] Affirmed by the Pennsylvania Superior Court, in P.U.R.1931A, 122.

[15] *Re* Meter Rates for Taxicab Service, P.U.R.1931B, 258.

[16] Note 2 *supra.*

[17] In Omaha, the only area to which state regulation of taxicabs applies.

[18] Note 7 *supra.*

[19] *Re* Menominee & M. Light & Traction Co. P.U.R.1932E, 345.

[20] *Re* Taxicab Fares (1931) P.U.R.1932A, 152.

[21] Yellow Cab Co. *v.* Farley, P.U.R.1931E, 334.

[22] PUBLIC UTILITIES FORTNIGHTLY, August 4, 1932, Special Section, 168.

[23] Note 6 *supra.*

[24] Note 2 *supra.*

[25] Note 11 *supra.*

[26] Patrick *v.* Smith (1930) 45 F. (2d) 924, P.U.R.1931B, 366.

[27] *Re* Yellow Cab & Baggage Co. P.U.R. 1932D, 121–137.
[28] *Re* Meter Rates for Taxicab Service, P.U.R.1931B, 258.
[29] *Re* Taxicab Fares (1931) P.U.R.1932A, 152.
[30] PUBLIC UTILITIES FORTNIGHTLY, April 28, 1932, Special Section, 543.
[31] City Cab Corp. *v.* Patrick, P.U.R.1932C, 1–20.
[32] Yellow Cab Co. *v.* Farley, P.U.R.1931E, 334.
[33] Note 28 *supra.*
[34] *Re* Meter Rates for Taxicab Service, P.U.R.1931B, 258.
[35] PUBLIC UTILITIES FORTNIGHTLY, April 30, 1931, Special Section, 561.
[36] *Re* Taxicab Rates in Hartford, P.U.R. 1931D, 405.
[37] Note 31 *supra.*
[38] PUBLIC UTILITIES FORTNIGHTLY, May 12, 1932, Special Section, 603.
[39] Note 34 *supra.*
[40] 99 Pa. Super. Ct. 417, P.U.R.1931A, 122.
[41] *Re* Taxicab Fares (1931) P.U.R.1932A, 152.
[42] As to court and commission interpretation of "public convenience and necessity" see Chapter 7 of my book cited in note 9, *supra,* and my article, "Factors in Granting Motor Carrier Certificates of Convenience and Necessity," *Indiana Law Journal,* January, 1930. That the phrase constitutes an indivisible unit in a legal sense as substantiated from decisions is set forth in my article "Motor Carrier Regulation in Missouri," *Missouri Bar Bulletin,* December, 1928.
[43] All citations made in note 42 explain the use of singular verb form.
[44] Article cited in note 1 *supra.*

Some Coming Features—

Shall the Commissions Regulate Utility Rates—or Profits?

The time has come, boldly states PHILIP CABOT, *Professor of Public Utility Management at Harvard University, for an entirely new viewpoint toward regulation; methods heretofore observed have become out-moded during the present economic crisis and present-day problems can no longer be solved merely by giving stiffer doses of regulatory medicine and more of it. In the August 17th number.*

The Growing Need of Simplifying and Standardizing Rate Procedures

May the comparative stability of costs of electric power in a world of declining price levels be attributed in part to the fact that the items involved in estimating reproduction cost of a utility's plan are too conjectural? Can they be reduced to practical working standards of computation? DR. JOHN BAUER *thinks they can—and he suggests a method of procedure in a coming number of this magazine.*

The Revamping of the Commissions

A critical survey of the reorganizations of the state regulatory bodies during the past four months, the reasons for these changes and the trends which they portend. By HUBERT R. GALLAGHER.

The Passing of the Era of Regulation by Competition

The handwriting on the wall as revealed by the new Emergency Railroad Act of 1933, and its significance to the public utility industry and to the state commissions. By KARL STECHER.

What Others Think

The Legal Execution of Regulation's Stormy Petrel—Section 15a

GONE but not forgotten is the troublesome Section 15a of the Transportation Act of 1920, otherwise known as the Recapture Clause.

This nightmare alike to the railroads and to their regulators was officially put to death by way of specific repeal in the recently enacted Emergency Railroad Transportation Bill. Disregarding the pious injunction, to speak naught but good of the deceased, the reaction to the passing of Section 15a was apparently one of unanimous relief and outspoken condemnation of the mischievous clause.

The *St. Louis Globe-Democrat* expressed the following editorial epitaph to the departed:

> "The repealed Recapture Clause, never asked for by the railroads but inserted in the 1920 act at the request of savings banks and other holders of rail securities, was especially provocative of litigation over prospective rate injustices. The necessity to protect investments and avoid unfair, confiscatory decisions will still lurk in the background, but rate making and litigation over it will be rendered much simpler by the new basis. Probably the test of the legality of a rate will be the practical one of what it yields after being applied for some time."

There is a marked difference, however, in the reasons which various interests give in hailing the end of the Recapture Clause. Roughly they can be divided into two classes: (1), those who believe it was wrong and unjust in principle, and (2), those who believe it all right in principle but impossible in practical administration.

IT is necessary to recall the nature of the railroad structure in order to appreciate the difficulties both in theory and in practice. This nature is such that the natural unit for measuring the scope of any given uniform rate-making area is the "district" or "regional" group of carriers operating under a common "group-rate-structure." Therefore, in applying the familiar principle that the reasonableness of a utility's rates depends upon the return yielded on the fair value of the utility's propertry, the "utility" must be considered as the railroad group as a whole and not the individual units composing the groups. The old Transportation Act expressly recognized this when it required a rate structure that would provide a fair return on the railroad group property as a whole. Of course, under such an arrangement it became apparent that some railroads in a given group would earn more than the average fair return of the group, while others would earn less than the standard. Here is where the trouble started back in 1920.

Thomas F. Woodlock, well-known economist, writer, and former member of the Interstate Commerce Commission, who should, therefore, be familiar with the trials of attempting to administer Section 15a, points out what he believes to be a fundamental departure from sound principle at this point:

> "Congress could not endure the thought that any railroad should earn more than so much. So, in defiance of all logic, it ordered recapture of half of all net earnings over 6 per cent on the value of any railroad component in the group and confiscated the 'excess' for the Treasury of the United States, the money to be loaned on strict pawnbroking terms to needy railroads who could furnish security for the loan. The Supreme Court of the United States sustained the constitutionality of the act and in so doing undertook to justify its logic. Of the (unanimous) decision of that august body in the Dayton-Goose Creek Case it is —or ought to be—sufficient to say that it

finally landed the court in the position of asserting the astounding proposition that 'unreasonable' utility profits could be made from 'reasonable' rates! This truly remarkable piece of reasoning resulted from failure to recognize that the rate-making unit was not the single railroad but the railroad group, and that paragraph (5) *et seq.* of Section 15a were totally inconsistent with the rate-making rule in paragraph (2) of the same section!"

The present members of the Interstate Commerce Commission, however, still appear to believe in the principle and "equity" of the Recapture Clause and in its recent annual reports to Congress the Commission recommended its repeal only because of the difficulties of its administration. In a recent case involving group rates for the transportation of coal, one of the present members of the Commission said:

"The fact that we have recommended the repeal of the recapture provisions of the act . . . emphasizes, if any emphasis were needed, the need of keeping the local rates on these 'coal-carrying machines' within just and reasonable bounds."

Apparently the present commission still believes that a utility can make "unreasonable" profits from "reasonable" rates. It is, indeed, a strange anomaly of regulation.

THE average reader may be inclined, however, to ask what difference it makes now that repeal is dead and buried whether the end came because it was theoretically unsound or merely inconvenient. Upon further study of the remarks of those who consented to the execution of Section 15a solely on grounds of administrative difficulties, it may perhaps make a great deal of difference in the future. It means that legislators of this persuasion have not yet given up the idea that the so-called unreasonable profits should be disgorged and that they will continue to seek new legislative devices for effecting that end. For example, Senator Norris attempted, during the congressional deliberations on the recent Emergency Transportation Act, to insert an amendment which would require the commission to allow a "fair return" on the value of a rail carrier's property as based either on prudent investment or the cost of reproducing the property, *which ever is lower*. Although this amendment was lost in the conference between both houses on the final draft of the bill, it did pass the Senate, which shows that similar regulatory experiments have a fair chance of success in the future if the temper of Congress becomes more "progressive." This would mean that the commission could value one railroad in a given group on one basis and another on the alternative basis in order to equalize profits.

OTHER utilities, such as gas, electric, and telephone companies, which have been accused at various times and in various places of reaping excessive profits would do well to consider these tendencies. The railroads are so down and out that such legislation would do them comparatively little harm, since most of them do not make a fair return on any basis at all. But the, so far, more fortunate utility industries can profit by these indications of what is in the minds of those legislators whose avowed solicitation for "reasonable" rates seems to be overshadowed by their inability to endure the thought of utility profits. Rigorously applied over a long period, such a double standard of value as that suggested by Senator Norris might produce a progressive diminution in utility earnings as to make confiscation a reality.

BEFORE saying a fond good-bye forever to the Recapture Clause, let us consider the conflicting views about the amount of "excess earnings" already theoretically accrued under the clause prior to its repeal, collection of which the government will waive under the new law.

Coördinator Eastman, in his capacity as a member of the Interstate Commerce Commission, told a Senate committee on April 5, 1933:

"Now, I come to the estimated amounts due under recapture. We furnished certain estimates to the House committee last year. Those have been rechecked and have been

somewhat changed, but up to the end of 1931, the total estimate for all classes of railroads is $342,239,639. You will understand that those estimates are rough, and do not necessarily represent the sums which the Commission would finally find to be due, after hearing protests, and still less do they represent what the courts may find to be due after litigation."

Representative Sabath, of Illinois, said the railroads "owed the government" nearly $300,000,000, and sarcastically referred to the Emergency Transportation Act as "a donation of $361,000,000 to the poor railroads controlled by the poor J. P. Morgan & Company."

Senator Nye, of North Dakota, speakon the St. Lawrence Seaway Treaty made a similar statement:

"The $350,000,000 debt of the railroads to the public Treasury, which is canceled by that bill, would, if paid into the Treasury, pay the entire Federal cost of the St. Lawrence project, officially estimated at $168,000,000, and leave a surplus of $182,000,000, which might be expended on the development of the Missouri, the Ohio, the Mississippi, and other waterways."

The *Traffic World* objects to any such estimates because of the absence of any judicial confirmation of the amounts. It stated editorially:

"To say that, as the result of repeal of the recapture provisions, the railroads are being relieved of a 'debt' of $350,000,000 or are the recipients of a 'gift' of that amount, is not correct, as the use of those words implies that a legal determination of the amount due has been made—which is not the fact. It may be that, if recapture had been carried to a conclusion for all roads alleged to have been in the recapture class for the period 1920–1930, for example, the government might have recovered $100,000,000, or $200,000,000, or any other amount. To determine the amount of excess earnings due the government the Commission, proceeding under the law that has now been repealed, had to fix the value of the property of each carrier alleged to be in the recapture class. . . . Each carrier ordered to pay any substantial amount in compliance with a Commission recapture order no doubt would have taken the case to court. The aggregate amount that might have been ultimately recaptured by the government could not have been known until these cases had been determined finally by the courts. It is possible, of course, that, after the Supreme Court had sustained the Commission in several cases, the litigation over recapture orders would have decreased."

Under such circumstances, it might be suggested that the opponents of the St. Lawrence Seaway Treaty could easily obtain their purpose by agreeing with Senator Nye that the seaway should be built with the $350,000,000 recapture money due from the railroads, when, as, and if collected—assuming that the clause would not be repealed.

—J. T. F.

NEW RATE-MAKING BASIS. Editorial. *St. Louis Globe-Democrat.* June 15, 1933.

RECAPTURE DEAD. By Thomas F. Woodlock. *The Wall Street Journal.* June 13, 1933.

LOOSE RECAPTURE TALK. Editorial. *The Traffic World.* June 17, 1933.

Is There a Definite Upward Trend in Municipal Plants?

ASIDE from any debates on the merits of the question of whether or not there should be a universal acceptance of government ownership of electric or other types of utilities—a view specifically disavowed by President Roosevelt during his preëlection campaign, the impression has grown that there is a definite rising tide of municipal ownership that threatens the ultimate complete socialization of the electric industry. We do know from the excellent and authoritative published surveys of Dr. Herbert B. Dorau that the municipal plants increased steadily in this country until they reached their peak in 1922, after which there was a continued decline up to and including the year 1929. What has happened since? Has the nation-wide agitation against the privately owned power industry caused a reversal of this downward sweep of

the past decade? Are municipal plants now being established more rapidly indicating a revival of the interest in public ownership?

The public ownership advocates claim that there is now prevailing a rising tide of municipal plants and agitation that will ultimately bear fruit in many new municipal plants. As late as April, 1933, the monthly organ *Public Ownership*, edited by Carl D. Thompson, stated:

> "The past month has shown in a most striking manner the rapidly growing sentiment for municipal and public ownership throughout the country. With the Federal government under the leadership of President Roosevelt taking up the Norris bill for the development of Muscle Shoals and planning great public works programs for the relief of the unemployed; with literally hundreds of municipalities seeking the aid of the Reconstruction Finance Corporation for the development of self-liquidating municipal projects; and the ever growing demand for the nationalization of the banks as the only solution of the banking problem and of the railroads—surely the tide of public ownership sentiment is rising rapidly.
>
> "Meanwhile, the municipalities of the country, by the hundreds, are turning to municipal ownership as the only solution of their utility problems as never before."

SECRETARY Thompson goes on to tell of particularly important "key points" of pending municipal ownership agitation, including such communities as Hammond, Ind., St. Charles, Mo., Superior, Wis., Norfolk, Va., Rockford, Ill., Lapier, Mich., and Beloit, Wis.; but what are the facts—that is to say, what is the entire picture? Dr. Paul Jerome Raver is among those carrying on the excellent research work formerly done at the Institute for Economic Research in Chicago by Dr. Dorau.

Dr. Raver finds that the downward curve of the 1922–1930 period had not turned up at the end of 1932, but its downward pitch had noticeably slackened and showed evidence of a straightening out at an early date with an ultimate upturn, if the present trend continues. He finds that on the last day of the year 1927, there were 2,424 municipal plants in existence, whereas on the last day of the year 1932 there were 1,885 in existence—a net decline of 539. But the figures, he warns us, are misleading because 91 per cent of this decline took place during the years 1927 to 1930 inclusive, which would indicate an abrupt slackening of the declining rate during the last two years up to last January.

During this same 5-year period, 90 new municipal plants came into existence, but 66 of them (or 70 per cent) were born during the year 1931–1932. Conversely, although 629 municipal plants changed to private ownership during the full 5-year period, 510 of such changes occurred during the first three years, leaving only 119 changed during the two years 1931–1932. It will be seen that the spread between 66 births and 119 deaths is considerably reduced as compared with the respective total 5-year figures of 90 births and 629 deaths.

One reason mentioned by Dr. Raver as a possible explanation of the renewed interest in municipal plants is rather interesting. He says that aside from public agitation against private utility rates, as well as corporate misdoings, many communities have embarked on municipal ownership as an escape from the mounting pressure of debt and with corresponding diminution in tax collections. By issuing new bonds for plant construction, these municipal officials seek to mortgage the future so as to reap the benefit of present revenue. If this is true to any appreciable extent, is there not a day of reckoning not any farther off than the maturity date of such bonds, when such plants will have to be sold to private interests to avoid the postponed default? Perhaps, as Dr. Dorau suggested in 1929, the municipal ownership movement has its cycles and we are now on the upswing.

—F. X. W.

THE RISING TIDE. *Public Ownership*. April, 1933.

MUNICIPAL OWNERSHIP IN THE LAST FIVE YEARS. By Paul Jerome Raver. *The Journal of Land & Public Utility Economics*. May, 1933.

Present-day Trends in the Task of Coördinating and Regulating the Carriers

Two themes, inter-carrier relationships and railroad financial health, dominate current discussion of transport matters. About these related *foci* Dr. Harold G. Moulton and associates have woven the array of facts, principles, and recommendations which make up the nine parts and thirty-eight chapters of their bulky volume, "The American Transportation Problem." This impressive accumulation, though possessing an important nucleus of slower growth, is largely the product of the brief period since the organization last October of the National Transportation Committee, with ex-President Coolidge as its chairman, and the Brookings Institution as its research affiliate. The volume opens with a full reproduction of the committee's report.

The prevalent situation where unlike transport agencies present alternative modes of shipment and travel receives major emphasis in the study. For this situation the principle that transportation costs are not made less by public subsidy, and that traffic will be routed most economically only as each agency bears fully its own appropriate costs, is effectively supported as the basis of sound policy. By this test the inland waterway comes off badly, as one would suppose. Air transport is seen as making little progress toward self-support, and while subsidy is not opposed for the present, immediate abandonment of the more unprofitable airmail routes and eventual withdrawal of all public aid are recommended. Motor transport, while formerly enjoying a nearly free roadway, is now believed to pay special taxes for road use which "approximately cover the current annual cost of state and county highways." The statistical showing, however, is not complete; and it is not clear that road cost is made to include interest on the unamortized past investment. On this score the pipe lines are given a clean bill of health.

But the desired competitive equality involves more than the absence of public financial aid. Attention is properly called to the propriety of requiring each carrier to contribute to the general support of governmental functions. Analysis of tax payments by railroads does not reveal that they pay too much, according to prevailing tax principles of wide application; but their rivals are seen to pay too little. Unproductive expenditures (such as grade crossing eliminations) moreover, burden rail carriers unduly. The need is urged of a new principle of apportionment, with administrative determination of each case. Similarly unproductive are expenditures on bridges over waterways, and on compliance with full-crew and train-limit laws. The familiar contention that the railroads should be relieved of the handicap arising from unequally restrictive regulation receives no significant discussion. To what extent a carrier should be regulated, not because of its own inherent nature but because of the interests of its rivals and their patrons, is a question of importance, not simply answered. The committee report suggested that "we cannot solve the problem on the theory upon which horses are handicapped in a race." The matter might have been discussed concretely, for example, in terms of enforcing minimum rates upon motor trucking.

But public policy in the field of inter-carrier relations is not concerned merely with creating satisfactory competitive conditions. It is equally important, in the present situation, to promote an effective correlation of the services of unlike agencies. Much promise is seen in the better organized use of motor vehicles in railroad terminal and line-haul service. Better and cheaper service is foreseen, and competitive duplication will be limited to a "twilight zone" where the preferable

agency is not obvious. But while the volume stresses effectively the importance of integrating agencies, little is said that is especially illuminating and helpful. The reader may still entertain his misgivings respecting any easy narrowing of the "twilight zone" and as to the disposition of "a railroad company, converted to a transportation company," to assign each description of traffic to the agency best suited for it. The rôle of public authority in the integrating process is not outlined. "Coördination" is still a magic word whose use is more often vaguely suggestive than discriminatingly informative.

WHEN we turn to the treatment of railroads as such, transport policy is likewise seen largely in terms of the integration of carriers. The spur of competition is not denied, but the economies of coöperation are preponderant. Most in need of doing is effective unification of railroad terminal operations. No one mode of unification is insisted upon, nor does the treatment come to grips with the knotty problem of depriving entrenched carriers of their superior terminal locations; but an authoritative solution is deemed necessary. Consolidation as now provided for is called into question, both because it is voluntary and because the preservation of competition is required. Whether regional or nation-wide, monopolistic amalgamation is looked upon as a source of large economies, though no specific recommendation or program is offered.

Immediately important is the authors' stand that railroad rates, in an economic system where distorted price relationships have far-reaching influence, should be adjusted to changes in the general business situation. If heavy fixed charges oppose such readjustment, it is the capital structure which should give way. (In an excellent discussion of railroad reorganization it is held, however, that the conditions of an unprecedented depression should not compel revision of normally sound capital arrangements.) For the present embarrassing rule of rate making with its requirement of fair return on fair value, the flexible substitute approved by the Interstate Commerce Commission is recommended, involving a general mandate to maintain rates high enough, but no more than sufficient, to insure adequate and efficient service. The commission's valuation work is found to be so tenuously related to rate fixing, and to the other purposes by which its continuance is justified, that the reader may be mildly surprised to learn that such continuance is deemed to be "important." He may wonder also why three chapters are devoted to valuation out of four concerned with the regulation of the rate level. The fourth chapter recommends repeal of the Recapture Clause, for reasons made familiar by the commission. The question is usefully discussed whether earnings during the 1920's, despite their failure to yield the approved return on investment, may not have attracted an undue volume of new capital into the industry. In the case of a fairly large line mileage it is held that a heavy burden of proof rests on the railroads and the commission to justify continued operation, since abandonment seems distinctly desirable. Respecting the rate structure little is said, though incidentally stated positions include a condemnation of Hoch-Smith rate making, a favorable attitude toward the establishment of train-load rates, a recommended clarification of policy respecting distance discrimination, and a suggestion that a 1-cent or 1.5-cent rate per passenger-mile be given a trial.

THE principle of coördination is seen to apply to the organization of transport regulation no less than to the services regulated. A national system of transportation requires a national system of regulation and guidance, to be administered, it is urged, by the Interstate Commerce Commission. To prevalent misgivings respecting commission control the reply is unequivocal: "The commission cannot be charged with favoritism toward the railroads. . . . The commission is competent

to meet greater responsibilities." Some change in organization and procedure may be desirable, and the dividing line between regulation and management may require redefinition. Army engineers whose training at West Point included no economics are not deemed capable of judging what outlay on waterways is warranted; nor do the processes of the Post Office Department appear well calculated to guide wisely the growth of air transport. But whether the commission should perform such functions is not stated.

As remarked in the preface, time was insufficient to "give adequate attention to literary form" in preparing the volume. Some errors are present; *naiveté* is occasionally manifest in the handling of transportation concepts; disproportionate attention is paid some topics at the expense of others, and the index is not carefully prepared. Some matters, such as the railroad financial situation, are usefully analyzed; a few are treated perfunctorily, with no evidence of rigorous analysis. Any suspicion appears unwarranted that the study was biased by the source of the funds which financed it. The conclusions, any of which might be arrived at by an unattached investigator, involve elements as likely to prove objectionable to railroad as other interests. Certainly the timeliness of the work should bespeak for it a wide reading.

—SHOREY PETERSON,
University of Michigan.

THE AMERICAN TRANSPORTATION PROBLEM. By Harold G. Moulton and Associates. Washington: The Brookings Institution. 915 pages. 1933. $3.

The Effect of Communication Agencies on American Social Life

"COMMUNICATION Agencies and Social Life," by Malcolm M. Willey and Stuart A. Rice, is one of several of the monographs prepared under the direction of President Hoover's Research Committee on Social Trends. It is in form an information report for the use of the committee in preparing its general report entitled "Recent Social Trends in the United States."

"Communication agencies" as conceived by the authors embrace not only steam and electric railways, motor vehicles, highways, waterways and airways, the telephone, telegraph, cables, and wireless, but also such agencies as the urban and rural postal service, newspapers and periodicals, radio broadcasting, motion pictures, and hotels. In addition to the physical mechanism of communication, they consider also the conference and convention, touring and travel, vacations, advertising, and the like as part of the culture pattern of communication in social life. But the authors recognize that they have not covered the whole field when they observe: "The interchange of ideas, attitudes, and emotions in the family, on the play ground, in the neighborhood, the office and shop, at the corner store, and across the tea table, has passed unmentioned, and is present only by implication. Yet it is such interchanges which are of fundamental importance in setting the personality of the growing child and in giving meaning to the life of the adult."

The statistical material (perhaps in all, 100 tables) relates to the trends in steam and electric railway traffic, railway mileage and abandonments, motor vehicle traffic, highway mileage, highway speeds, water-borne traffic, airway traffic, domestic and foreign tourist traffic, hotel utilization, conventions, safety of travel, utilization of the postal service, and the telephone, telegraph, wireless, and cable services, circulation of newspapers and periodicals, news lineage, motion picture attendance, radio

stations, receiving sets and listening areas, and many other subjects. The statistical work is admirable. The meaning and limitations of the data are carefully explained. There is little danger of misinterpretation. The result is an excellent historical study of the development of modern communication.

THE point of view from which the authors see the problem may be described as sociological rather than economic and political. The recurrence of words and phrases common to the literature of sociology, such as "culture patterns," "isolation," "organization," "interaction," indicate the field of interest of Willey and Rice in communication agencies in this study. As evidence of the exclusively sociological point of view, I should call attention to the discussion of the growth in the ownership of automobiles. The authors say:

> "It is impossible to say whether this marks the approach of the inevitable saturation point in automobile consumption, or whether the check in evidence since 1929 represents merely a trough in an unusually severe business cycle. For present purposes the answer to this question is inconsequential since in either case the automobile has definitely woven itself into the habit patterns of the American people and become an integrated part of their culture."

But what is the central sociological problem considered?

The book is primarily concerned with whether the development of communication agencies has fostered nationalism or localism. The evidence seems to point most strongly to the conclusion that these agencies have tended to enhance localism to the greater extent. This is especially true of the automobile, electric railway, the telephone, local mail, and the local newspaper. On the other hand, the steam railway, the airway, the postal service, the radio, the movie, advertising, and travel have enhanced nationalism.

Communication agencies have had effects which have changed the culture pattern of American life in more profound ways than can be discovered by examining the effect upon the individual of point to point or face to face contacts.

THIS study of communication agencies, as they relate to the development of nationalism or localism, jumps across great changes in the economic pattern of life. There has been a new extension in the specialization of labor so that there are new ways of earning a living. Women run typewriters instead of hay rakes. It has made us urban instead of rural. We have changed our diets. There are more salads and less corncake. In fact, the whole picture of consumption has been changed. Food, clothing, and shelter are no longer the main elements of consumption. We now consume radios, gasoline, automobiles, and movies. These new elements in the culture pattern seem to me to be exceedingly important in shaping the life of the individual.

Or putting the matter still differently, communication agencies have brought together iron and coal, cotton and rubber, raw materials and power, skill and markets. Production has a new meaning. A railroad is more than a passenger carrier; in fact, passenger service is only a by-product. The telephone is a production agency. So is the newspaper, the radio, or the highway. It is a limited view that sees these agencies only as means to individual contacts.

Furthermore, Messrs. Willey and Rice do not consider the effect upon the individual of the enormous growth of social *stimuli* and the attending multiplication in the range of choice, occasioned by the growth of communication agencies. And what has been the effect on the rest of our culture pattern, on language and writing systems, on shelter and dress, on art, on scientific development, on religion, on family relationships, on political forms and judicial procedure, and on war? On these problems the authors do not dwell.

—ARCH D. SCHULTZ

COMMUNICATION AGENCIES AND SOCIAL LIFE. By Malcolm M. Willey and Stuart A. Rice. New York: McGraw-Hill Book Company, Inc. 1933. 228 pages. $2.50.

The March of Events

General Johnson Calls for Utility Code

A WASHINGTON, D. C. dispatch to the Newark *News* on July 10th revealed that a call had been issued by General Hugh S. Johnson, national recovery administrator, to representatives of the public utilities of the country to meet with him on that day at New York to begin preparation of a national code. The meeting was to be at the offices of Lehman Bros. The call was general and did not indicate that separate codes would be set up for the gas, electric, or transportation industries. It was expected that the session would merely produce an outline of what is to be expected of the industry and that experts would then be assigned to work out the details.

Insomuch as matters of production, competition, and retail prices of public utilities are generally regulated by state and in some cases by Federal commission, it was also expected that the code would deal principally with working conditions of utility employees.

Wants Public Works Funds for Municipal Plants

SECRETARY Carl D. Thompson, of the Public Ownership League, in a current article in the *Capital* (Wis.) *Times* expressed the fear that the fund of $1,500,000,000 to be dispensed under the industrial recovery act for public works to the various states may not be available for municipal utility plants because of the selection of biased state directors for the dispensation of the fund in the various states and districts. Mr. Thompson points out that under the law 30 per cent of the amount advanced to each municipality will be a direct grant, leaving 70 per cent to be advanced by the government. The United States is divided into ten regions, each one under a regional director located in Washington. In addition to this each state is to have a Federal public works administrator who will decide what projects are to be recommended to Washington to receive a loan. Thus the municipality must first get the approval of the state director, then of the regional director at Washington, and finally of the general director at the top. Secretary Thompson urged upon every friend of municipal ownership and progress the following recommendations:

"(1) Find out as quickly as possible who is being put forward for the position of state director in your state and where these candidates stand. If the candidates are known to be power company men, protest immediately to the administrator of the Federal emergency public works at Washington, D. C., and

"(2) Suggest two or three good outstanding public ownership men in your state and urge the appointment of one or the other as state director.

"(3) Get in touch at once with as many organizations, and especially municipalities and their associations, and with influential citizens in your state, and get their coöperation and coöperate with them in these matters."

Utilities Investigation May Run into 1934

WHILE the Federal Trade Commission earlier in the year had planned substantial completion of its public utility investigation before July 1, 1933, later developments and unexpected delays make it apparent that the investigation will run well into 1934. according to a Washington, D. C., dispatch to *The Wall Street Journal*. It is hardly likely that the report of the commission, to be submitted to Congress, will be ready before July 1, 1934, and in some quarters this is regarded as a conservative estimate. The investigation has now been going on for more than five years and has been divided into two parts, publicity activities of the various utility groups and financial methods.

Notwithstanding the fact that some of the utilities are changing their former methods, it is not doubted in the least that the report of the commission will recommend strict regulation of the industry, particularly with reference to the holding company. One thing that will contribute to the delay in the investigation is the transfer of many of the commission's trained men to other parts of the government, due to the enactment of emergency legislation. Quite a number of the staff of accountants will be transferred from the utility investigation to study the issues of securities under the Securities Act passed by the last session of Congress, which the Federal Trade Commission will administer. During the remainder of the investigation the commission will center its efforts on the natural gas phase of the utilities. This part of the industry heretofore has received little attention, and most of the electrical end of the industry has been completed.

While President Roosevelt stressed the utility issue somewhat in his preëlection campaign, it is not believed he will push legislation until the trade commission has written its final report. In such an event, it is unlikely that any action will be taken by Congress until the session beginning in January, 1935, unless there is a very urgent demand for emergency legislation which will keep Congress sitting through the summer of 1934.

Engineers Clash on St. Lawrence Treaty

A BITTER fight over the merits of the St. Lawrence seaway treaty now awaiting ratification by the United States and Canadian governments broke out June 29th before three of the principal engineering groups of the United States—American Society of Civil Engineers, American Society of Mechanical Engineers, and the American Institute of Electric Engineers. All three were in joint session on the power question at Chicago on that date.

Principal adversaries in the fight over the seaway treaty were Dr. Daniel W. Mead, professor of hydraulics at the University of Wisconsin; Frank P. Walsh, well-known attorney and chairman of the New York Power Authority; Thomas H. Hogg, chief engineer of the publicly owned Ontario Hydro-Electric Company, and United States Senator Robert M. LaFollette, of Wisconsin.

Professor Mead charged that ratification of the treaty in its present form would be "a serious misfortune to both the United States and Canada," and invited the societies to expel him from membership if they believed him a propagandist. Mr. Walsh charged the Mead report was loaded with omissions and misleading statements, contained unwarranted slurs on former President Hoover, and invited the societies to repudiate the author for "attempting to utilize the societies for dissemination of propaganda." Senator La Follette's contribution came in the form of a telegram from Washington, and accused Professor Mead of being an agent of the "power trust."

Mr. Hogg was of the opinion that the St. Lawrence treaty problem cannot be satisfactorily solved on engineering and economic grounds alone. He stated that with the international boundary involved, there are national, state, and provincial interests which must be given consideration. He went on to discuss the question of safeguarding the Canadian towns and Montreal from floods, the question of winter ice jams in the river, and other factors which, he said, went into concluding the treaty.

Cove Creek Dam Threatened by Underground Cave

DISCOVERY of a series of caves under that part of the Tennessee valley which would be flooded by the government's proposed Cove Creek dam project is causing concern to the Tennessee Valley Authority officials, according to a Washington, D. C. dispatch of July 10th to the New York *Times*. Some subterranean passages had already been reported by army engineers during surveys in the last few years, but geologists employed by the Tennessee Valley Authority have now discovered that there are "ten for every one reported."

Dr. Arthur E. Morgan, chairman of the board created by the last Congress to carry out President Roosevelt's improvement plan, said that the problem was so serious that location of the dam might have to be changed. Dr. Morgan, who had returned from an inspection trip to the Cove Creek site, said that water "just dropped off into holes and did not again appear." Geologists have been sent to survey thoroughly the entire length of the valley which would be flooded. Construction of the dam will not be started until after it is proved that the underground passages will not endanger the project. Dr. Morgan made clear that he was not attempting in any way to criticize army engineers who first made the survey for Cove Creek.

California

Impounded Funds Distributed to Gas Consumers

CHRISTMAS came early for 220,000 southern California gas consumers on July 1st, when checks totaling $375,000 were mailed to consumers by the Southern California Gas Company in effecting rate reductions estimated to save users one million dollars a year. The checks represented refunds based on the lower rate schedule fixed by the state railroad commission in December, 1932. The reduction in rates was supported by the recent decision of the United States Supreme Court.

Illinois

State Commissioners Resign Office

THE resignations of G. Gale Gilbert, Paul Samuell, and Philip Collins as members of the Illinois Commerce Commission were announced on June 29th. The three commissioners were holdovers from the Emmerson administration, and their resignations were effective July 1st. Chairman Benjamin F. Lindheimer, who accepted the appointment last winter for six months, said that he would continue on with his duties indefinitely in order to carry out Governor Horner's program.

Chairman Lindheimer also said the new law giving the commission wider powers would be effective July 1st, and a survey would be made of all utilities in the state, at their own expense, to determine whether reductions might be ordered. The measure passed the senate by a vote of 35 to 9 and after a concurrence with the house conference committee on an amendment which gave the measure additional regulatory strength it was sent to the governor for his signature. It was signed by him July 10th.

Indiana

Municipal Utility Plants Organize League

TWO hundred and fifty officials from Indiana cities and towns owning utilities were to be entertained in Richmond on July 12th and 13th at a convention called to organize a utility ownership unit of the Indiana Municipal League. The convention was arranged by D. C. Hess, superintendent of the Richmond city-owned light plant, who is vice president of the Municipal League. The event will be especially significant, Mr. Hess said, because it will permit officials of towns where light plants are municipally owned to inspect the plant in Richmond, where in the last two years nearly $1,000,000 has been spent in improvements. The improvement program was to be about completed at the time of the convention.

The convention was to study various phases of municipal ownership and set up standing committees which will be expected to make specific studies of municipal ownership. Material collected will be reported to cities owning utilities. The municipal ownership division has received a prominent place on the convention of the Municipal League to be held in Bedford in the fall.

With eighty-five cities and towns owning electric plants or distribution systems, seventy owning water plants and one a heating plant, Hess and other officials of the league believe a division such as this will become one of the outstanding features of the Municipal League.

Governor Urges Municipal Plant Building

URGING that many hundreds of workers could be employed by increased adventures into and expenditures for municipally owned utilities, Governor Paul V. McNutt has indicated that his administration favors such action as a way out of the depression. In an address before 500 local government officials late in June, Governor McNutt claimed that this could be made an integral and important part of the $50,000,000 public works program of the state. The plan is to have the program underwritten and 30 per cent financed by the Federal government.

Chairman Perry McCart, of the Indiana Public Service Commission, told the audience how such a plan might be placed in effect and commented favorably on the scheme as offered by the governor. Mr. McCart was of the opinion that such projects would have to be put upon a self-liquidating basis. A call for plans to be submitted by various communities within thirty days was made.

Kansas

Commission May Extend Uniform Accounting Requirement

TELEPHONE companies serving 75 per cent of the subscribers of the state were affected by an order of the Kansas Corporation Commission relating to uniform accounts which became effective July 1st. This order requires large companies to keep their fixed capital, operating revenues, and operating expenses so as to permit them to show separately (1) all items applying to each individ-

ual telephone exchange; (2) all items applying to each toll system, and (3) all items common to more than one exchange or toll system.

That a similar new order may include electric distributing companies and gas distributing concerns also is indicated by N. A. Anderson, chief engineer of the corporation commission, who stated that the commission has undertaken a revision of the uniform system of accounts for electric companies in addition to the telephone companies.

Kentucky

Hand-set Phones Reduced to Twenty-five Cents

THE rates on hand-set telephones in Louisville and Kentucky generally will be reduced from 50 cents to 25 cents a month, effective with the August billings, it was announced late in June by M. A. Erskine, district manager of the Southern Bell Telephone & Telegraph Company. The charge for the special type instrument is in addition to the regular service costs. According to the Louisville *Courier Journal*, there are about 5,000 of the hand-set telephones in Louisville, and about 1,200 sets in other cities of the state of Kentucky. The reduction was voluntary.

Louisiana

Commission Obtains Phone Rate Cut

THE Southern Bell Telephone & Telegraph Company has agreed to a reduction in rates in the Metairie Ridge area served by the Cedar exchange of New Orleans, it was announced on June 26th by Harvey G. Fields, chairman of the commission, who said the reductions would result in savings of $15,978 a year to subscribers of that section. Chairman Fields said he expected the company, as a result of its agreement to the Cedar exchange proposal, to agree to the establishment of a four-party line service in New Orleans which, according to figures furnished by the telephone company, would give a reduction of approximately $86,940 a year to individuals who would take four-party service in the place of the two-party service.

Five thousand coin "pay station" subscribers were affected by a majority ruling announced July 1st by the commission, decreasing the allowance to such subscribers in New Orleans by the company on proceeds above the monthly guarantee charge. New Orleans pay station subscribers guaranteeing the company $5.25 on the coin box per month, so far have received 45 cents of every dollar deposited at the station above the required amount. The new regulation increases the company's share of the proceeds from 55 to 70 cents, leaving the subscriber the reduced percentage commission of 30 cents on the dollar. Members of the commission explained that this regulation which is being extended to the city of New Orleans has been in practice in other cities of the state of Louisiana for some time.

On the same day the commission approved of a statewide reduction of cradle-type telephone charges to 25 cents from 50 cents a month, and lowering of special telephone company rates for extra long cords and for moving sets within the same building. Secretary P. A. Frye, of the commission, said that it had approved the recommendation by Chairman Fields for the reductions, which would save Louisiana telephone subscribers many thousand dollars annually. Chairman Fields estimated that the cradle-type telephone rate reduction alone would save subscribers a total of $37,374 a year.

Massachusetts

Government Seeks Lower Utility Rates

AS the result of a demand by officials of the War Department for a 10 per cent reduction in rates charged for electricity, gas, and water at Federal government properties in Massachusetts, the state department of public utilities on June 30th summoned the officials of six public utility companies to appear before the department on July 5th to discuss the propriety of the rates. So far as could be ascertained, this was the first time

that the department had received a request from the Federal government for a reduction in the rates of utilities companies.

Representatives of gas and electric companies in Massachusetts appeared on the day set before the department and opposed the petition. F. Manley Ives, representing the Edison Electric Illuminating Company of Boston, said he could see no reason why the company should ask one rate for one class of customers and another for the Federal government. W. R. Peabody, counsel for the United Electric Company of Springfield, opposed the petition and said the War Department should not ask for a reduction in rates at a time when other departments of the government are attempting to raise prices generally. The petition was supported by Major Michael J. Carney, Watertown Arsenal; R. L. Miller, South Boston Army Base; Colonel S. W. Joyes, Springfield Arsenal, and Captain William M. Cline.

Missouri

St. Louis Seeks Gas Rate Cut

A TWENTY per cent reduction in gas rates to domestic consumers in the city of St. Louis was asked in a formal complaint against the Laclede Gas Light Company, sent to the Missouri Public Service Commission on July 3rd by the city. The action stated that such a cut in rates, pending a valuation hearing, would be "fair to the consumers and not unjust or unfair to the Laclede Company." The complaint was submitted to the commission by Mayor Dickmann, City Counselor Hay, and Associate City Counselor Ferris. On June 29th, the officials of the Laclede Gas Light Company refused to grant a request for a voluntary 5 per cent reduction in rates asked by the city counselor. The city immediately asked and obtained from the commission a hearing on the gas rate situation. It was set for July 13th.

City Counselor Hay stated that the original cut asked had been ultraconservative in the hope that an amiable adjustment could be reached. He was of the opinion that the 20 per cent requested was not unreasonable and would save gas consumers about $1,000,000 a year if granted.

Nebraska

Army Seeking Lower Rates of Utilities

THE Army on June 27th asked the city council of Omaha and the Metropolitan Utilities district for a 10 per cent reduction in rates for electricity, gas, and water. The council referred the request to the committee of the whole. The district replied that there was no prospect of a cut in water rates, and "little" prospect of one in gas. The request was made on instructions which were received from Washington by Colonel S. F. Bottoms, quartermaster of the Seventh Corps Area, and applied to utility services at Fort Omaha, the Baird building, and the quartermaster's depot.

New York

May Limit Utility Return to 6 Per Cent

FAST on the heels of a decision of the public service commission on June 30th limiting the return on the value of a water utility in Utica, N. Y., to 6 per cent, came a statement from Commissioner George R. Lunn that emergency rates embodying only a 6 per cent return will be ordered for gas and electric properties pending formal hearings. This was subsequently modified by a statement from Chairman Maltbie to the effect that the commission had not laid down any rule which it would absolutely apply to all cases and would attempt to deal fairly with every corporation. Chairman Maltbie said no determination had been made of any rule which is to be applied to all corporations before the commission had an opportunity to examine the facts.

Mayors of the cities in the Albany district on July 1st called upon the commission to lower rates immediately under the threat of municipal ownership and operation of utilities, according to a news item in the *Electrical World* of July 8th. The occasion was the

hearing on the proposal of the New York Power & Light Corporation to lower gas rates with a prospective saving of $600,000 a year to consumers. Randall J. LeBoeuf, Jr., general counsel of the utility stated that in 1932 and during the first part of 1933 rates had been reduced voluntarily $1,100,000, including the present proposal. He stated that his company was not afraid of an investigation and that making due allowance for the new Federal taxes the rate of return to the company would be about 1.45 per cent.

Commission Bares High Salaries of Utility Officials

IN the course of its investigation of the Long Island Light Company, the New York Public Service Commission has revealed evidence dealing with compensation of utility officials which has received considerable notice from the daily press throughout the country. One of the facts brought out was the testimony of Russell F. Van Doorn, vice president of the Long Island Light Company, that the company had paid $100,000 in premiums on the life of President E. L. Phillips. Mr. Van Doorn stated that the money was paid by the company on the $400,000 life insurance policy of Mr. Phillips, although E. L. Phillips & Company, a Manhattan engineering concern of which he is also president, was named beneficiary. The premium was paid from 1926 to 1930, inclusive.

Asked to explain how the lighting company would benefit through the collection of any death claim by the construction company, the witness said that the money was paid "for the protection of E. L. Phillips & Company," as the "continuity of the business of the contracting company was essential to the Long Island Lighting Company." Fire insurance premiums on the $500,000 Phillips mansion at Plandome, L. I., were also paid by the Long Island Lighting Company, as well as taxes in 1928 and 1929. Mr. Phillips subsequently denied that the company had paid for his life insurance, or had paid taxes and interest, or other similar items, notwithstanding Mr. Van Doorn's testimony.

In the case of the New York Edison Company, evidence indicated that salary totals to principal officers had increased during the depression while total payrolls had fallen off through the reduction in construction forces. The hearings, which are part of the general investigation of rates in the metropolitan area, will be continued.

North Dakota

Hand-set Phone Rates to Be Reduced Soon

REVISED rates on the use of hand-set telephones will become effective October 1st for subscribers of the Central West Public Service Company, the Northern States Power Company. and the Red River Valley Telephone Company, according to an announcement on July 7th by the North Dakota Railroad Commission which was published in the Bismarck *Tribune*. The companies have been charging 25 cents per month extra for the hand sets. The new rate provides that this extra charge be discontinued after 36 or more consecutive payments. The reduction will be the result of negotiations carried on by the commission under the leadership of its president, Fay Harding.

Ohio

U. S. to Demand Utility Rate Cut

THE Columbus Gas Fuel Company, as well as the Columbus Railway, Power & Light Company has been notified by the U. S. War Departmnet that a 10 per cent reduction will be demanded, it was learned on July 6th. Supplying both Fort Hayes and the Fifth Corps Area reserve depot, the gas company has been told that existing contracts will be canceled by the government, and that if the 10 per cent reduction in rates is not agreed to in a new contract, the government will file a formal complaint before the state commission.

Early Decision Expected in Ancient Bell Case

DECISION in the 9-year old Bell Telephone rate case will be made within six weeks or two months, according to a news item

appearing in the Columbus *Evening Dispatch* of July 11th. The members of the staff of the public utilities commission were working on the case, in order to bring it into conformity with the recent rulings of the Illinois Bell Telephone rate case decision. Should the utilities commission follow the plainly indicated rule of the Ohio Supreme Court in the recent Columbus gas rate case, doing away with the statewide rate principle, possibilities are that another delay of months will be occasioned before any of the cities will receive any benefit or lose any advantages due to decrease or increase in rates, because it would then be necessary to fix a rate for each city.

Pennsylvania

Two New Appointments on State Commission

DEPUTY Attorney General Herman J. Goldberg of Wilkes-Barre was selected by Governor Pinchot to succeed Dr. Clyde L. King on the public service commission for the term expiring July 1, 1937. Mr. Goldberg's choice was announced a few hours after the supreme court had handed down an unanimous decision ousting Chairman King as a member of the commission because the senate had not acted on his confirmation, and because the governor had failed to reappoint him. The formal appointment of Mr. Goldberg was expected to be made early in August.

Previous to the Goldberg appointment, Governor Pinchot announced the reappointment of C. J. Goodnough, of Emporium, as a member and as chairman of the commission. Mr. Goodnough's terms expired July 1st. He takes the oath of office for a 10-year term ending July 1, 1943.

Observers and state officials, according to the *Electrical World,* predict that the King decision will end Governor Pinchot's attacks on the regulation of public utilities by the present commission, but will not stop his drive for stricter laws governing the operation of utilities.

Tennessee

Lack of Legislation May Delay Municipal Plant

TENNESSEE'S failure to pass a power district bill at the last session of the legislature may delay availability of government power for publicly owned plants in the state of Tennessee, according to an announcement in the Knoxville *News Sentinel* of July 10th. Confronted with the demand for immediate construction of a transmission line from Muscle Shoals to Cove Creek, Commissioner David E. Lilienthal of the valley authority expressed an interest in the possibility of finding a market for power in Tennessee. He said that he was interested in the "legal possibility of municipalities buying power."

The power district bill, which was lost along with other measures affecting utilities in the last session of the state legislature, would have authorized municipalities or districts to organize and issue bonds for the erection of distribution systems. Inasmuch as governmental units, without such a law, are required to get authority from the legislature to issue bonds, it was said to be doubtful if present statutes are adequate to permit cities, counties, or districts to buy and retail government power unless they already have municipal plants or authority to build such plants.

Extra Charge for Hand-set Phones Reduced

THE state commission on June 29th ordered the Southern Bell Telephone & Telegraph Company to reduce its existing rate of 50 cents a month for "French type" telephones to 25 cents. The change will be effective on bills rendered on and after August 1st. M. R. Williams, the commission's utility engineer, said about 12,400 subscribers, principally in Memphis, Nashville, Chattanooga, and Knoxville, would be affected. Their annual savings were estimated at about $38,000.

The four larger Tennessee municipalities will contend for abolition of all extra rental charges made by the telephone company on French sets after cost of the instruments have been absorbed by the customer, City Attorney Joe Anderson of Chattanooga said, following the publication of the order. He said that the municipalities were not satisfied with reductions made by the state commission.

Texas

Dallas Utility to Absorb Federal Tax

THE announcement of the Dallas Power & Light Company that it will absorb the government tax on domestic light bills will effect a 3 per cent reduction in the size of the bill for the consumer at the moment when commodity prices are rising, according to the Dallas *Morning News* of June 28th. The tax must still be paid but the power and light company will pay it. The change in the manner of payment of the government tax takes place September 1st. The total reduction in rates thus effected in a year's time preceding that date will be 7 per cent for Dallas consumers.

Virginia

Commissioner Hooker Heads National Association

THE new president of the National Association of Railroad and Utilities Commissioners is H. Lester Hooker, member of the state corporation commission of Virginia. Mr. Hooker, who was first vice president and one of the dominant officials of the association, succeeds Amos A. Betts, of Arizona, who has resigned.

The association has been particularly interested in efforts to procure national control of motor vehicle carriers. Mr. Hooker, according to the Richmond *News Leader* of July 4th, was in Chicago for a session of the executive committee to draft plans for the forty-fifth annual convention to be held October 13th in Cincinnati, Ohio.

Washington

Seattle Considers Municipal Phone Plant

PROPOSALS made on July 3rd by Garrison Babcock and Kenneth Harlan, utility experts, that Seattle go into the municipal telephone business in the event that the Pacific Telephone & Telegraph Company should refuse to meet city demands, were set for discussion in the city council. Mayor John F. Dore was noncommittal on the recommendations except to say that he understood that the experts had been employed only to determine reasonable rental for the use of the streets by the telephone company, while operating without a franchise, and a reasonable time to give the company to remove its property if it were unwilling to pay such rental.

Mayor Dore added that he had no thought of the city putting in its own telephone service to combat the Pacific Telephone & Telegraph Company, and that he did not believe the members of the council had any such thought when they asked for the survey made by Messrs. Babcock and Harlan. Entertainment of any such a venture, however, would involve a costly preliminary study by utility experts.

Wisconsin

Senate Votes Milk a Public Utility

A BILL to make the Wisconsin milk business, including all of its branches, a public utility subject to regulation by the agriculture and markets commission was passed on June 27th by a vote of 27 to 5 in the Wisconsin senate. If concurred in by the assembly and signed by the governor, the measure will require each person or corporation in the business of manufacturing and distributing dairy products to obtain a license from the commission.

The commission would be authorized to revoke the licenses of persons or firms that violate its price-fixing orders, which, according to an amendment to the bill, may be issued only after the commission has completed a survey of the "cost of production" of raw milk.

The Latest Utility Rulings

Chairman King Ousted from Pennsylvania Commission

GOVERNOR Pinchot has been returned victor by the Pennsylvania Supreme Court in his campaign to oust Clyde L. King from the chairmanship of the Pennsylvania Public Service Commission. Chairman King was appointed last year by Governor Pinchot to succeed the late Judge Ainey, who resigned from the chairmanship. The senate refused to confirm the appointment. The senate also refused to appoint several other appointees of the governor to the commission, but at the same time it did not reject any of the appointments, including Chairman King's. Before the end of the legislature, however, a serious disagreement arose between Governor Pinchot and Chairman King as to the propriety of continuing a senatorial investigation into the relation of the Pennsylvania commission with the public utilities of the state. Chairman King took the position that further investigation was unnecessary, a position which, although the governor violently disagreed with at the time, he has since appeared to have taken himself, in view of his recent veto of a bill for appropriating funds to continue the senatorial investigation.

The breech between Chairman King and Governor Pinchot, however, continued and at the end of the legislative session Governor Pinchot, acting upon the theory that appointments not acted upon lapsed with the adjournment of the senate, appointed all of his commissioners over again with the exception of Chairman King. Then the attorney general brought an action to oust Dr. King from the chairmanship after Governor Pinchot had named Hon. C. J. Goodnough as the new chairman of the commission.

Several previous court decisions dealing with the appointment of commissioners were reviewed by the court. The most pertinent of these was the so-called "Stewart Case" which arose during Governor Pinchot's first term. In the Stewart Case the court had held that the governor had no power to withdraw or recall an appointment before the senate could act upon it. The question raised in the King Case, therefore, was whether, following the Stewart Case, such appointments remained before the senate indefinitely until acted upon, or whether, as the attorney general contended, they remained before the senate only during its session and then lapsed automatically upon its adjournment. The court sustained the attorney general.

It was pointed out that to permit the senate to hold in abeyance for an indefinite period the power to oust a responsible public official at any time by mere formal rejection of his appointment would be equivalent to giving the senate power in effect to remove such officials by a majority vote, whereas the state law expressly provides that removal of commissioners from office must be by the governor by and with the consent of the senate. Of course, the result of the recent decision is to give the governor the same power as long as the senate refuses to act upon his appointments. *State ex rel. Schnaber v. King.*

Federal Commission Fixes Original Cost for Washington Hydro Project

THE Federal Power Commission has announced its decision of June 28th, in the matter of the actual legitimate original cost of the Chelan River Project—No. 637—in Washington. This project was completed in 1927 and 1928 at a claimed cost of slightly over $11,000,000 of which the commission now allows $9,634,326.57. The disallowances refer almost wholly to the items for interest and taxes.

The licensee, the Chelan Electric Company, had held some of the lands practically twenty years before starting construction of the dam near the outlet of Lake Chelan and the tunnels leading down to the power house on the bank of the Columbia river, giving a head of 395 feet. For most of this time the Chelan Company had been a subsidiary of the Great Northern Railway, as its agent in connection with the then projected electrification of the Great Northern. Later, in 1925, control of the Chelan Company was purchased by the Washington Water Power Company as a part of its operating system and the license from the Federal Power Commission was immediately applied for, the Federal jurisdiction being predicated on the tracts of public land involved.

Actual construction began in January, 1926, but the order of the commission recognizing the necessity of making extensive surveys and investigations as well as of acquiring a large number of parcels of lands widely scattered, allows a period of three years prior to the beginning of physical construction as reasonably necessary, sufficient, and adequate for such preliminary work. Interest and taxes extending back to 1907 had been claimed, and these claims were presented at the hearing before the commission on April 4th and 6th of this year.

Only two of the five units of the projects have thus far been completed and the commission's order denies the power company's claim that a proportion of the initial investment be carried in suspense after the first unit was completed. This theory of charging up interest and taxes on "unused capacity" is rejected as not in conformity with the Federal Water Power Act and unsound in principle.

The opinion written by Chairman Smith comments on the unusual character of the licensee's accounting statement for this project in that it shows a gratifying freedom from the troublesome items that so commonly arise from inter-company transactions under contract or agreement, the parties to which are closely affiliated by common ownership or control.

Specific attention also is given in the opinion to certain large interest items that were not entered up currently, appearing on the books only after changes in control of the licensee company. Any "write up" of the kind suggested by such a delayed entry is effectively prevented by the accounting rules prescribed under the Federal Water Power Act. *Re Chelan Electric Co. Chelan Project No. 637, Washington, Opinion No. 7.*

Utility's Right to Discontinue Service to Delinquent Consumers Defined

THE New Jersey Court of Errors and Appeals has recently defined the right of a public utility company, in the absence of express legislative provision, to discontinue service to delinquent consumers, as well as limitations upon such right. In the first place, the court held that a utility in the exercise of its right to adopt reasonable rules for the conduct of its business and the

operation of its plant may enforce such rules even to the extent of denying service to patrons who fail to comply with them. It was pointed out that this power of a utility to make and enforce its own rules is not dependent upon any specific and statutory authority, but is a power incidental to the nature of a public service corporation. The right was said to include the making of a reasonable regulation regarding the discontinuance of service to customers who fail to pay their bills, as well as to enforce reasonable rules requiring consumers to pay for service for a reasonable time in advance.

However, the court held that unless expressly authorized by a legislative act making the arrears for bills for utility service a lien upon real estate, a water utility has no right to cut off a water supply merely because arrears due from a former owner have not been paid by a present occupant. Likewise, it was held that a water company could not cut off service to holders of a first mortgage on certain property who took possession of the premises by way of a provision of the mortgage resulting from a default in the mortgage payment. It was pointed out that such mortgagees did not take possession as agents or representatives of the owner of the equity of redemption, and to compel them to assume payment of arrearages for water furnished to the owner would be equivalent to establishing a lien upon the premises for the amount in arrears. This, it was said, is a legislative and not a judicial function. *Vanderbilt et al. v. Hackensack Water Co.*

Commission Lacks Authority to Compel Unprofitable Utility Operations

THE supreme court of New Hampshire upon transfer of a judicial question by the public service commission of that state held that a railroad is not required either under common law or by statute to continue offering service to the public which the public will not use, especially where continued operations are a financial burden and where a demand for its continuance would be unreasonable. The court distinguished carefully between the right of a utility to abandon service permanently and the right of a utility to discontinue unprofitable operations. A provision of the New Hampshire law (Pub. Laws 1926, Chap. 247, § 9) providing that proprietors of railroads shall keep the railroad in good repair and shall not discontinue any part of it except as permitted by law was held to refer to the discontinuance of the utility plant and the right of way and not to service, since under the statute operation is to be agreeable to the proper object and purpose of the railroad, thus leaving the duty of operation to be ascertained on common-law doctrines.

It was pointed out, also, that if cessation or curtailment of alleged unprofitable operations were later shown to be unreasonable, the public service commission would have the power to order the restoration thereof. It was decided that the commission would have no power to grant in advance on a railroad's petition its right to abandon the service entirely.

Where the railroad had posted notice of intention to discontinue certain passenger train service, withdrawal of petitioners praying that the commission should order a continuation of the service was held not to deprive the commission of its jurisdiction to investigate the matter and to order a restoration of service if the discontinuance was found to be unreasonable.

The proceedings arose upon the petition of certain railroad passengers asking that the commission order a continuance of certain passenger train serv-

ice by the Boston & Maine Railroad. The supreme court, upon transfer of the question by the commission, ordered the case to be discharged. *Thompson et al. v. Boston & Maine Railroad.* (*166 Atl. 249.*)

State Regulation of Interstate Pipe Line Held Invalid

IOWA statutes prohibiting the construction, maintenance, and operation of pipe lines within that state without a permit from the board of railroad commissioners, and providing that a pipeline company obtaining such permit shall be conclusively presumed to have accepted the provisions of the statutes as to the regulation of such company, and to have consented to the levy of such taxes on its gross receipts as the legislature might see fit to prescribe, are void to a foreign corporation engaged exclusively in interstate commerce in that the statutes constitute a burden on interstate commerce in violation of the Commerce Clause of the Federal Constitution, according to a digest of the decision of the Iowa Supreme Court as reported in *The United States Weekly Law Journal.*

The Iowa legislature may not, in view of such Commerce Clause, tax gross receipts of a foreign corporation engaged exclusively in interstate commerce and may not require the corporation to consent to the levy of an unconstitutional tax as a condition to the right to do business in the state.

The statutes, in so far as they attempt to create an estoppel to question the constitutionality of a void statute, are invalid regardless of whether the pipeline company's consent to levy of such a tax as a condition to obtaining a permit would in law have estopped it to invoke the Constitution as a defense against the collection of such a tax. The invalidity of the provisions requiring such consent as a condition to the issuance of a permit invalidates other provisions requiring the permit as a condition to the right to construct, maintain, and operate pipe lines in the state since the provisions are parts of one act and construed together constitute a burden on interstate commerce. The statutes, in requiring the foreign corporation to procure a permit to do an interstate business even on its private right of way, are also in violation of the Commerce Clause under the rule that a state may not prevent a foreign corporation from coming into the state for all legitimate purposes of interstate commerce.

Provisions of the statutes requiring pipe-line companies to pay an annual license fee for the right to operate in the state are likewise void under the Commerce Clause as to the foreign corporation transacting exclusively an interstate business. The license fee is exacted not merely for the privilege of using and crossing the public property of the state but also for the right to operate in the state and, therefore, constitutes a burden on interstate commerce.

A state cannot require a foreign corporation to pay an annual license fee for the right to carry on interstate commerce in the state. The annual license fee exacted from pipe-line companies by the Iowa statutes as a condition precedent to the right to do business in the state cannot be sustained under the rule that a state in the exercise of the police power may enact reasonable inspection laws and charge an interstate carrier a reasonable license fee for making legitimate and reasonable inspection and may also require an interstate carrier to pay a reasonable fee for the use of the state's highways. *State ex rel. Iowa Board of Railroad Commissioners v. Stanolind Pipe Line Co.* (*No. E–41579.*)

Constitutional Power of the Commission Outweighs Home Rule Charter

ARTICLE IV, § 20, of the Nebraska Constitution, invests the regulation of rates, service, and general control of common carriers in the Nebraska State Railway Commission. Under the same Constitution and the laws of that state jurisdiction of the home rule cities include within their purview only matters of strictly municipal concern. This is the view taken by the majority of the Nebraska commission in ruling upon objections made by the city council of Omaha to the jurisdiction of the state board to entertain a recent application of the Omaha & Council Street Railway Company for authority to curtail service on such bus lines as were showing a deficit in earnings. The majority took the view that while the city of Omaha is a home rule city, the charter thereof, under the requirements of the law, must be consistent with and subject to the laws of the state including especially the Constitution.

Chairman Randall, writing the opinion of the majority, took the position that the functioning of common carriers and the regulation of common carriers are not matters of strictly municipal concern and in fact are matters of statewide concern and, therefore, subject only to the jurisdiction of the state, as specifically vested by the aforementioned Art. IV, § 20, of the state Constitution. Commissioner Bollen, in a dissenting opinion, took the position that the constitutional power of the commission was modified by the section of the Constitution (§§ 2, 5, Art. XI) permitting cities of more than 5,000 inhabitants to frame a charter for home government over all matters of municipal concern. Commissioner Bollen believed that the curtailment, control, regulation, change, or discontinuance of bus service within the city of Omaha was a matter of strictly municipal concern, since the jurisdiction should be in the city of Omaha.

The majority found the bus service mentioned in the company's complaint unprofitable and granted authority for the proposed curtailment and discontinuance. *Re Omaha & Council Bluffs Street Railway Co.* (*Application No. 10260.*)

Other Important Rulings

The United States District Court for southern Texas has dismissed for want of equity a suit by an alleged interstate motor carrier to restrain the Texas commission from interfering with its operations. The commission had refused the carrier a permit to operate, basing its decision wholly upon considerations of traffic conditions and excluding all consideration of competition in carrier service. In addition to its alleged interstate character the carrier was alleged to be a private contract carrier only. Following the recent decision of the United States Supreme Court in Bradley *v.* Ohio Public Utilities Commission, P.U.R.1933C, 259, 53 S. Ct. 577, the court held that the Texas commission in the exercise of its general statutory powers to exclude from the highways those who propose to make their living by hauling on them, contract as well as motor carriers, had not acted arbitrarily in view of evidence that the highways were already far too heavily congested, and that the safe and convenient operation over them of vehicles having the primary right to run on them would be greatly injured by the additional use which the carrier in the case at bar desired to make of them. *Wald Storage & Transfer Co. v. Smith et al*

NOTE.—The cases above referred to, where decided by courts or regulatory commissions, will be published in full or abstracted in *Public Utilities Reports.*